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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Case No. 19-34054-sgj-11
)	
Highland Capital Management, L.P.,	)	Chapter 11
)	
Debtor.)	
)	

**AMENDED APPENDIX TO MOTION FOR FINAL APPEALABLE ORDER AND
SUPPLEMENT TO MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455 AND
BRIEF IN SUPPORT [DKT. 3406]**

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, “Movants”) file this Amended Appendix in support of their *Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support*:

Exhibit No.	Description	Appendix Nos.
31	June 10, 2021 Hearing Transcript	APP’X. 2720-2810
32	December 10, 2020 Hearing Transcript	APP’X. 2811-2815
33	June 17, 2021 Order	APP’X. 2816-2828
34	February 9, 2022 Memorandum Opinion and Order by Judge Kinkeade	APP’X. 2829-2842

35	Withdrawn	APP'X. 2843-2924
36	Withdrawn	APP'X. 2925-3013
37	Withdrawn	APP'X. 3014-3044
38	January 14, 2021 Hearing Transcript	APP'X. 3045-3049
39	May 20, 2021 Hearing Transcript	APP'X. 3050-3054
40	May 10, 2021 Hearing Transcript	APP'X. 3055-3067
41	June 25, 2021 Hearing Transcript	APP'X. 3068-3070
42	March 1, 2022 Hearing Transcript	APP'X. 3071-3073

Dated: August 26, 2022

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

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CERTIFICATE OF SERVICE

The undersigned certifies that, on August 26, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 31

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

1		)	Case No. 19-34054-sgj-11
2)	
3	In Re:	)	Chapter 11
4)	
5	HIGHLAND CAPITAL	)	Dallas, Texas
6	MANAGEMENT, L.P.,	)	Thursday, June 10, 2021
7		)	9:30 a.m. Docket
8	Debtor.)	
9		)	MOTION TO COMPEL COMPLIANCE
10		)	WITH BANKRUPTCY RULE 2015.3
11		)	FILED BY GET GOOD TRUST AND
12		)	THE DUGABOY INVESTMENT TRUST
13		)	(2256)
14)	
15)	
16	HIGHLAND CAPITAL	)	Adversary Proceeding 21-3006-sgj
17	MANAGEMENT, L.P.,)	
18)	
19	Plaintiff,	)	DEFENDANT'S MOTION FOR LEAVE
20		)	TO FILE AMENDED ANSWER AND
21	v.	)	BRIEF IN SUPPORT [15]
22)	
23	HIGHLAND CAPITAL)	
24	MANAGEMENT SERVICES, INC.,)	
25)	
	Defendant.)	
)	
)	
		)	Adversary Proceeding 21-3007-sgj
)	
)	
	Plaintiff,	)	DEFENDANT'S MOTION FOR LEAVE
	TO	)	TO AMEND ANSWER TO PLAINTIFF'S
	v.	)	COMPLAINT [16]
)	
	HCRE PARTNERS, LLC)	
	N/K/A NEXPOINT REAL)	
	ESTATE PARTNERS, LLC,)	
)	
	Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

1 WEBEX APPEARANCES:

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23 Proceedings recorded by electronic sound recording;
24 transcript produced by transcription service.
25

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1 DALLAS, TEXAS - JUNE 10, 2021 - 9:44 A.M.

2 THE COURT: All right. Let me change my stacks here.
3 I will now hear what was Matter No. 1 on the docket, Highland
4 Capital, Case No. 19-34054. We have a motion from the Dugaboy
5 and Get Good Trusts seeking compliance with Bankruptcy Rule
6 2015.3.

7 Who do we have appearing for the trusts this morning?

8 MR. DRAPER: Douglas Draper, Your Honor.

9 THE COURT: All right. And for the Debtor this
10 morning?

11 MR. POMERANTZ: Good morning, Your Honor. Jeffrey
12 Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the
13 Debtor.

14 THE COURT: All right. Do we have any other parties
15 wishing to make an appearances? These are the only parties
16 who filed pleadings, but I'll go ahead and ask if anyone wants
17 to appear for any reason.

18 MR. CLEMENTE: Good morning, Your Honor. It's Matt
19 Clemente at Sidley on behalf of the Committee. I'm here.

20 THE COURT: All right. Thank you, Mr. Clemente.

21 All right. Mr. Draper, how did you want to proceed?

22 MR. DRAPER: I'd just -- I think the issue is
23 primarily a legal issue, Your Honor.

24 THE COURT: Uh-huh.

25 MR. DRAPER: So we've filed with the Court our

5

1 response to the Debtor's opposition, I have some comments I'd
2 I like to make, and just leave it at that. I think -- as I
3 said, I believe the issue is purely a legal issue --

4 THE COURT: Uh-huh. Okay.

5 MR. DRAPER: -- and can go from that.

6 THE COURT: All right.

7 MR. DRAPER: All right. We are here -- thank you,
8 Your Honor. Can I start?

9 THE COURT: Yes, you may.

10 MR. DRAPER: Thank you. We're here before the Court
11 today on what should be a rather routine matter. All I'm
12 asking the Court to do is to require the Debtor to do what it
13 should have done when the case was filed and is required
14 pursuant to Bankruptcy Rule 2015.3.

15 2015.3 uses the term "shall" and requires the Debtor to
16 file an official form -- and this is important, because I'm
17 going to come back to the official form -- with respect to the
18 value, operations, and profitability of each entity in which
19 the Debtor has a substantial or controlling interest.

20 The reports, the Rule says, shall be filed seven days
21 before the first meeting of creditors and every six months
22 thereafter.

23 Under 2015.3(d), I recognize a court may, after notice and
24 a hearing, modify the reporting requirement. No request has
25 been made by counsel for the Debtor, who I will stipulate

6

1 knows the Rules, are experienced, and understand that the rule
2 existed the day they came into the case. And quite frankly,
3 what we have now is, from what I can see, an intentional
4 decision not to file the report.

5 As the Court knows, this matter was brought before this
6 Court in February, when the confirmation hearing was held.
7 And if the Court will recall, Mr. Seery's comment was (a) it
8 slipped through the cracks; and (b) he implied that it would
9 be done. That was February. I had hoped, and I think
10 everybody had hoped, that Mr. Seery, Highland, and Debtor's
11 counsel would be so embarrassed by the fact that they didn't
12 file [sic] the rule that they would have either (a) filed
13 [sic] the rule; or (b) sought -- sought a waiver of the rule.
14 They did neither.

15 Now, let's -- let's go through the 2015.3(d). There are
16 two items that are not exclusive, and so I recognize it. The
17 first is that they can't do it, and second is with respect to
18 the information is publicly available. If you look at the
19 cases that the Debtor has cited in support of their position
20 that courts have waived compliance with the rule, you'll note
21 that three of the four cases deal with first day motions when
22 in fact they ask for extensions of time to file their
23 schedule, Statement of Financial Affairs, and other things.
24 These are normal first day motions. I understand the
25 extension in that case. And quite frankly, those extensions

7

1 are -- fall into the "I can't do it."

2 The only excuse the Debtor has offered, other than their
3 response to date, was, oh, I forgot, or it slipped through the
4 cracks. That is not a legitimate excuse. It never has been
5 and never will be, and should not be countenanced by the
6 Court.

7 And so let's start with the after-the-fact excuses offered
8 by the Debtor. The first is the bad guy defense -- i.e.,
9 Dugaboy is a Dondero entity; they're asking for this
10 information for nefarious purposes. That has to -- that
11 should be completely disregarded by the Court. This is a
12 systematic issue that neither you nor I nor the Debtor's
13 counsel put in the Code or put in the Rules. It is a
14 requirement, it's systematic, and we, as counsel and people
15 acting on behalf of the estate and sort of people who oversee
16 the system, should insist that this be filed. The bad guy
17 defense is not an excuse. And quite frankly, this is
18 information that is required.

19 So what I'm asking for today is not gamesmanship. I don't
20 think it is ever gamesmanship when you ask for the compliance
21 with a rule that says shall. Again, it's systematic, and we
22 are here -- and I don't know why -- either the U.S. Trustee
23 was asleep at the switch or anybody else was asleep at the
24 switch -- that this matter hadn't been brought to the Court's
25 attention.

8

1 So the word "shall" is not strained in any fashion. It's
2 not limited in any fashion. The word "shall" is absolute.

3 So, again, had -- was there some secret deal between the
4 Trustee -- U.S. Trustee and the Debtor? I don't know. That
5 may have been. But quite frankly, --

6 THE COURT: A secret deal?

7 MR. DRAPER: -- the Code, in 2015 --

8 THE COURT: Did you just use the term "a secret
9 deal"?

10 MR. DRAPER: Well, some --

11 THE COURT: What --

12 MR. DRAPER: I'm not using the term. What I --

13 THE COURT: That's highly charged, that --

14 = MR. DRAPER: No, --

15 THE COURT: -- choice of words.

16 MR. DRAPER: What I mean, what I really mean is
17 sometimes we go to the U.S. Trustee and say, look, can we have
18 an extension? Can we have -- can we do this a little bit
19 later? And the U.S. Trustee, in fairness to them, basically
20 says, okay, you can do this or that. I don't know if that
21 occurred in this case. But quite frankly, what we have are 20
22 months of noncompliance. And so I don't know if they said,
23 look, --

24 THE COURT: Okay.

25 MR. DRAPER: -- you don't have to file it now.

9

1 THE COURT: So you meant an informal deal, not secret
2 deal?

3 MR. DRAPER: Yes.

4 THE COURT: A secret deal, that sounds like something
5 nefarious. Okay? So, --

6 MR. DRAPER: No, it is not intended in that -- it's
7 --

8 THE COURT: Okay.

9 MR. DRAPER: Judge, it's not intended in that
10 fashion.

11 THE COURT: Okay.

12 MR. DRAPER: This goes to my issue that it's
13 systematic. It's a systematic compliance.

14 And let's also go the fact that the Bankruptcy Code
15 requires complete and open disclosure. It does not matter who
16 or why compliance is requested.

17 The next objection is I waited too long. And they offer
18 an excuse, Judge, we're going to go effective. Let's look at
19 what the Code requires -- the rule requires. It says it shall
20 be filed, it has to be filed at certain points, through the
21 effective date of a plan. It doesn't say after the effective
22 date of a plan is filed or after the effective date of a -- of
23 a plan occurs, your compliance is not required.

24 And I'll point out something where you ruled against me,
25 and we've contrasted that in our motion -- in our opposition.

10

1 If you look at the examiner statute, which I know the Court
2 has looked at and completely disagreed with my reading of it,
3 it basically says after confirmation you don't have to do it.
4 This statute doesn't say that. This statute says you have to
5 file these through the effective date of a plan.

6 And so, you know, that "You waited too long" is really not
7 a legitimate excuse.

8 The next issue is -- and --

9 THE COURT: Well, on that point, --

10 MR. DRAPER: And let's look at the cases.

11 THE COURT: On that point, can I just ask, what is
12 the utility? I mean, let's say we're one -- okay. Let's say
13 we're one month away from the effective date. Let's say we're
14 three months away from the effective date. What is the
15 utility at this point? There's a confirmed plan. Now,
16 granted, it's on appeal. But, you know, what -- what would
17 you --

18 MR. DRAPER: Well, --

19 THE COURT: What would you do with this information
20 at this point? We have a confirmed plan.

21 MR. DRAPER: Well, there are two responses to that.
22 First of all, the rule says you have to file it through the
23 effective date of a plan. Somebody in rulemaking authority
24 made that determination. And so it's not for you or I to
25 question. That's the rule.

11

1 The second is the utility may be for further actions in
2 the case that occur after the effective date. We just don't
3 know.

4 And so the rule is designed to require things to be filed
5 --

6 THE COURT: Wait. What did that last statement mean,

7 --

8 MR. DRAPER: -- through the effective date.

9 THE COURT: -- for actions that might occur after the
10 effective date?

11 MR. DRAPER: It may be --

12 THE COURT: What does that mean?

13 MR. DRAPER: After the effective date of a plan.

14 There may be some -- some matter that comes up before the
15 Court. And I'll give you the best example --

16 THE COURT: Well, --

17 MR. DRAPER: -- of all of them.

18 THE COURT: Okay.

19 MR. DRAPER: If you look -- if you look at the form,
20 all right, and what I'd ask the Court to look at is -- I think
21 it's Exhibit E that's required on the form. And what Exhibit
22 E requires is disclosure of information where one of the
23 subsidiaries has either paid or has decided -- has incurred a
24 liability to somebody who would have an administrative expense
25 against the Debtor.

12

1 The utility of that post-effective date is important,
2 because post-effective date you'll be dealing with fee
3 applications and other things. So the rule envisions
4 disclosure --

5 THE COURT: Okay, I -- say that again for me slowly.
6 How --

7 MR. DRAPER: Okay.

8 THE COURT: How could there be an administrative
9 expense --

10 MR. DRAPER: If you'll --

11 THE COURT: -- claim against the estate in your
12 scenario, again?

13 MR. DRAPER: Well, my scenario, if you look at
14 Exhibit E that's required in the form, --

15 THE COURT: Do I have that, Nate?

16 MR. DRAPER: -- it basically requires a disclosure.

17 THE COURT: Okay. I don't know if I have it in my
18 stack of paper. I --

19 MR. DRAPER: Well, let me read it to -- I can read it
20 to you, Your Honor. It's easy. Let me pull it up.

21 Exhibit E, "Describe any payment by the controlled
22 nondebtor entity of any claim, administrative expense, or
23 professional fee that have been paid or could be asserted
24 against the Debtor or the incurrence of any obligation to make
25 such payments, together with the reason for the entity's

1 payment thereof or the incurrence of any obligation with
2 respect thereof."

3 That is clearly a post-effective date issue that the Court
4 should be concerned about, all parties should be concerned
5 about, and so if that occurred, then everybody needs to know
6 about it.

7 So E envisions something that is absolutely after the
8 effective date that will be -- has a utility after the
9 effective date.

10 Let's look at B. Again, something that may have something
11 to do with after the effective date. That deals with tax-
12 sharing agreements and tax-sharing attributes.

13 So -- and then C, which also has something to do with
14 after the effective date and how things sort out through the
15 liquidation, is described claims between controlled debtor,
16 controlled nondebtor entity and any other controlled nondebtor
17 entity.

18 So there needs to be a disclosure of due-to's and due-
19 from's between the entities. This is -- this is not secret
20 stuff. This is stuff that transcends the effective date of a
21 plan.

22 And so when I focused on the rule, what I think the Court
23 really needs to look at for the utility of this is exactly
24 what the -- is required by a 2015.3 disclosure.

25 Does that answer the Court's question?

14

1 THE COURT: Yes.

2 MR. DRAPER: Now, my favorite excuse that's been
3 offered is really what I'll call the secret sauce dispute --
4 excuse, or the former lawyers for the Debtor. Again, let's
5 break this down and let's look at the form.

6 What the form requires is there's nothing the Debtor's
7 former lawyers did or who were working for Mr. Dondero. If
8 you look at Exhibit A that's required, it contains the most
9 readily-available balance sheet. That's not a legal issue.
10 Statement of income or loss. That's -- that's just an
11 accounting concept. Statement of cash flows. That's also an
12 accounting concept. And statement of changes in shareholders
13 or partners equity for the period covered by the entire
14 report.

15 B again has nothing to do with the lawyers, it describes
16 the controlled nondebtor business entity's business
17 operations.

18 So the information that's here is purely accounting
19 information and it is not secret.

20 Let's, again, let's focus on A, which -- which I think
21 just deals with financial information. The first one is
22 balance sheet. All right. They've argued that this tells
23 what the value -- what we think the value of an asset is.
24 That's not true. A balance sheet may have a fair market
25 value. A balance sheet may have a book value. I don't know

15

1 what they have here. But quite frankly, if you or I sell my
2 house, our house, we go to our agent and we say, hey, look,
3 agent, you know, this is my listing price. That's my opinion
4 as to value. It may not be somebody else's opinion as to
5 value. And quite frankly, when somebody asks or wants to buy
6 an asset, what they come to, don't they ask, hey, what do you
7 want for it?

8 You know, book value does not equal value. And I know the
9 Court has held -- has had before it many clients or many
10 debtors, and I've represented a lot of debtors, who think a
11 Bic pen that they have is not worth ten cents but is worth a
12 gazillion dollars.

13 So that issue doesn't go to any secret information. The
14 statement of income doesn't go to secret information.
15 Statement of cash flows does not. And changes in shareholders
16 does not. There's no secret information. The only person who
17 this may be kept away from, possibly, and that -- that, I
18 don't think applies, is a competitor who may want to look at
19 these. And a court can fashion that relief and say, okay,
20 let's put this under seal. If somebody signs a
21 confidentiality agreement, they can have access to this.

22 But this is purely accounting information. It's nothing
23 more.

24 And the reference to trade secrets that the Debtor
25 attempts to make is just not true. This is not a trade

16

1 secret. There's no confidential research or development or
2 commercial information that's being disclosed. And 9018 that
3 they cite is truly an evidentiary rule. We're not -- this --
4 this requirement does not go to customers. It does not go to
5 pricing. It does not go to business processes. It just goes
6 to financial information.

7 So the global argument that they're making is undercut
8 significantly by the -- by what is required under the rule.
9 I'm just asking for mere compliance with the rule, nothing
10 more.

11 And so, you know, what -- I still don't understand what
12 the issue is, why it hadn't been done. And quite frankly,
13 again, this is systematic. It has nothing to do with who is
14 requesting it, what is requesting it. It should have been
15 done. It should have been done probably by the U.S. Trustee.
16 You know, somebody -- you know, and quite frankly, I've been
17 in this case since December. It was raised in February. You
18 know, I don't understand why, from February to the time I
19 filed this motion, they didn't come in and either (a) file the
20 reports, which on their face appear to be benign; or (b) ask
21 for some reason other than, oops, I forgot.

22 And so I'd ask the Court to require compliance. I don't
23 think the information here falls into any category of for
24 cause. They can do it. This -- and the cases -- any case
25 they cite does not support their proposition that it shouldn't

17

1 be done.

2 Does the Court have any questions for me?

3 THE COURT: Well, I do. My brain just constantly
4 goes to standing. And remind me again, the trusts you
5 represent have each filed proofs of claim, correct?

6 MR. DRAPER: Yes. And they're objected to, --

7 THE COURT: They are objected to.

8 MR. DRAPER: -- just so the Court's aware.

9 THE COURT: Okay. Remind me again what the substance
10 of the claim is about.

11 MR. DRAPER: The substance of the claim is I have a
12 -- I have a \$17 million debt owed to me by Highland Select.
13 And it is our position that this Debtor is also liable for the
14 Highland Select debts through its general partner status,
15 through its comingling of things, and how these assets fit
16 together, between Highland Select, which is a hundred percent
17 owned by the -- ultimately owned by this Debtor. So I'd --
18 again, the standing issue --

19 THE COURT: And the debt is --

20 MR. DRAPER: And I am also an equity holder.

21 THE COURT: And the debt is pursuant to a note?

22 MR. DRAPER: It's pursuant to a loan agreement
23 between my client and Highland Select.

24 THE COURT: All right. And was an administrative
25 expense filed by your client?

18

1 MR. DRAPER: Not by my client. No. And I'm also an
2 equity holder in the Debtor that, when the plan goes
3 effective, I ultimately have, at best, a residual interest
4 when the Star Trek Enterprise returns.

5 THE COURT: Okay. And what is that residual
6 interest? Remind me again. Isn't it less than one percent --

7 MR. DRAPER: After the --

8 THE COURT: -- of a subordinated --

9 MR. DRAPER: After all the class --

10 THE COURT: Go ahead.

11 MR. DRAPER: Right. Well, after all the classes are
12 paid in full plus a hundred cents on the dollar -- get a
13 hundred cents on the dollar plus some interest factor, and the
14 -- there's another party who has an equity interest that's
15 ahead of me get paid, I get some -- some money.

16 Again, I have a residual interest. It's very tangential.
17 And I'll be very frank to the Court and honest, I think
18 ultimately I will receive nothing under that residual
19 interest.

20 However, my -- the standing is not really an issue here.
21 Honestly, this is a systematic issue. I've tried to make that
22 clear for the Court. It's something that should be employed,
23 and who is asking for it is irrelevant. The Code requires --
24 the Rules require it. There is no excuse that they've given
25 that should absolve them of that. And whatever excuse they've

19

1 given basically falls in -- falls in the face of what the rule
2 -- the official form requires.

3 I'm not asking for a variance of the official form. I'm
4 asking that this Court not allow a "Oops, I forgot" or "It
5 slipped through the cracks" excuse.

6 THE COURT: All right. And who is the current
7 trustee of these trusts now?

8 MR. DRAPER: My trusts? Nancy Dondero is the trustee
9 of the Dugaboy Trust, and I think Grant Scott is the trustee
10 of the Get Good Trust.

11 THE COURT: Okay. I'm asking because we heard
12 earlier this week that Grant Scott has resigned from certain
13 roles.

14 All right. Mr. Pomerantz, do you have evidence, --

15 MR. POMERANTZ: Yes, Your Honor.

16 THE COURT: -- or argument only?

17 MR. POMERANTZ: Argument only, Your Honor.

18 THE COURT: Okay.

19 MR. POMERANTZ: As with -- as with many of the other
20 motions that have been filed with this -- in this case and has
21 burdened the Court's docket over the last several months, I
22 really can't help to wonder why we are here.

23 Eighteen months after the case was filed, after plan
24 confirmation, and with the effective date that's set to occur
25 soon, Dugaboy and Get Good, the family trusts, ask the Court

20

1 to compel the Debtor's compliance with 2015.3. It reminds me
2 of the motion that Mr. Draper mentioned that he filed on the
3 eve of confirmation, the eve of confirmation, fourteen months
4 after the case had been filed, seeking an examiner. And the
5 Court denied that motion without a hearing.

6 Now they're back again with, as Your Honor mentioned and
7 I'll get to in a little bit, with the same tangential
8 connection to the bankruptcy case and the same tenuous
9 standing that the Court has alluded to on several occasions,
10 including just a couple minutes ago.

11 It's clear that the motion, which is not supported by any
12 other creditor in the case and is actually opposed by the
13 Official Unsecured Creditors' Committee, is not about
14 financial transparency, as Mr. Draper would like Your Honor to
15 believe, but it's filed as a further litigation tactic to gain
16 access to information that Mr. Dondero would not be able to
17 obtain through discovery, who has tried to obtain through
18 other means, and that the Debtor believes will be used for
19 improper purposes.

20 One of the Movants, Dugaboy, is actually the holder of two
21 claims against the Debtor. I guess Mr. Draper forgot about
22 his administrative claim, which really goes to the validity of
23 it. One is the claim against the Select Fund, a subsidiary of
24 the Debtor, for which Mr. Draper says they should be liable,
25 including under an alter ego theory.

21

1 Yes, Your Honor heard me right. Dugaboy is saying that
2 the Debtor is an alter ego with a nondebtor entity. One would
3 think that, given the recent disclosures and commencement of
4 litigation -- and I'm talking about the UBS litigation -- that
5 Mr. Dondero would be the last one to raise alter ego. In any
6 event, that claim is disputed.

7 The second claim is an administrative claim that Mr.
8 Draper filed on account of their 1.71 percent interest in
9 Multistrat, saying they were damaged by decisions Mr. Seery
10 made by selling certain life insurance policies in the spring
11 of 2020.

12 There is a theme here, Your Honor: Claims that Mr. Seery
13 made decisions that harmed -- in this case -- Dugaboy's 1.71
14 percent interest.

15 The claim has no merit. The Debtor will contest it. But
16 even if it was allowed, the claim would be paid a hundred
17 cents on the dollar under the plan. And accordingly, the
18 information under 2015.3 is not relevant.

19 Get Good filed a claim which alleges they may have a claim
20 from its limited partnership interest in the Debtor. But for
21 the record, Get Good is not a limited partner of the Debtor.

22 So, how did we get here, Your Honor? The Dondero entities
23 sandbagged the Debtor by raising the issue for the first time
24 during the confirmation trial. Not in their briefs, not in
25 communications to the Debtor in advance of the confirmation,

22

1 but while the Debtor had its witness on the stand.

2 And why did they do it that way? Because they wanted to
3 be able to argue, and they did argue to Your Honor, that the
4 Court couldn't confirm the plan because the Debtor did not
5 comply with Rule 2015.3, was in violation of 1129(a)(2), and
6 the Court could not confirm the plan.

7 Of course, the Court rejected that argument. And when the
8 Debtor entity -- when the Dondero entities raised it as a
9 reason for Your Honor to enter a stay pending appeal, Your
10 Honor commented that that claim bordered on frivolous. And of
11 course, that issue has been raised to the Fifth Circuit as one
12 of the reasons to overturn Your Honor's confirmation order.

13 And why are the Dondero entities persisting now in their
14 effort to obtain disclosure? It's because they're desperate
15 to obtain financial information about the Debtor because they
16 want to become involved in the Debtor's future asset
17 dispositions at the nondebtor affiliates and they want to get
18 information.

19 As Your Honor will recall, Mr. Dondero filed a motion in
20 January asking for this Court to require the Debtor to bring
21 affiliated -- affiliated entity asset sales to the Court. The
22 Debtor opposed the motion, and before the hearing it was
23 withdrawn.

24 Your Honor has heard testimony from Mr. Seery throughout
25 the case that Mr. Dondero previously interfered with the

23

1 Debtor's asset sales and that -- and on that basis, the Debtor
2 was not comfortable including Mr. Dondero in sale processes.
3 And I'm not talking about the AVYA and the SKY stock from the
4 CLO funds, but rather certain transactions regarding SSP and
5 OmniMax which were subject to a motion made by, I believe, the
6 Funds or the Advisors -- I get them confused sometimes --
7 accusing the Debtor of mismanaging the CLOs. And if Your
8 Honor recalls, Your Honor denied that motion based upon a
9 directed verdict.

10 So, having been rebuffed by the Debtor in its attempts to
11 obtain financial information that they're not entitled to, the
12 trusts have one last effort. Press 2015.3 arguments, because,
13 of course, they're very interested in the integrity of the
14 process, in the institution, in the following of the
15 Bankruptcy Code. That is exactly what their motivation is.

16 But there's yet another reason, Your Honor, the Debtor
17 believes Mr. Dondero, through the trusts, is pursuing this
18 motion. As Your Honor is aware, the Debtor recently
19 discovered some extremely troubling information regarding a
20 massive fraud involving a previous --

21 (Audio cuts out.)

22 THE COURT: Uh-oh.

23 THE CLERK: He froze up.

24 (Pause.)

25 THE COURT: All right. Mr. Pomerantz, you're frozen.

24

1 Is everybody frozen, or is it just him?

2 MR. POMERANTZ: There'll be some judicial estoppel.

3 THE COURT: Okay. Mr. Pomerantz?

4 MR. POMERANTZ: Yes.

5 THE COURT: You were frozen for about one minute. So
6 I am sorry, --

7 MR. POMERANTZ: Uh-huh.

8 THE COURT: -- you're going to need to repeat the
9 past minute for me.

10 MR. POMERANTZ: Just to check if you were listening,
11 Your Honor, what was the last thing you remember me saying?

12 THE COURT: I was listening.

13 MR. POMERANTZ: Okay. So I will -- did you hear me
14 talk about Mr. Seery's testimony throughout the case?

15 THE COURT: No. No.

16 MR. POMERANTZ: Okay. I'll go back a paragraph
17 before. Okay. Okay.

18 And why are the Debtor -- why are the Dondero entities
19 persisting now in their effort to obtain disclosure? It's
20 because the Dondero entities are desperate to try to obtain
21 financial information, information they would not otherwise be
22 entitled to under discovery rules, because they want to become
23 involved, he wants to become involved in the Debtor's asset
24 dispositions in the future regarding affiliated nondebtor
25 entities.

25

1 If Your Honor will recall, Mr. Dondero made a motion in
2 January seeking an order from this Court requiring the Debtor
3 to bring to this Court asset sales from nondebtor affiliates.
4 The Debtor opposed the motion, and before the hearing on the
5 motion it was withdrawn.

6 Your Honor has heard testimony from Mr. Seery throughout
7 the case that Mr. Dondero previously interfered or tried to
8 interfere with the Debtor's asset sales, and on that basis the
9 Debtor was not comfortable inviting Mr. Dondero into its asset
10 sale processes.

11 And I'm not talking about the AVYA and SKY stock from the
12 CLOs, but rather certain transactions regarding SSP and
13 OmniMax, which were closed for fair value, which were subject
14 of a motion that the Advisors or the Funds -- and I often get
15 them confused -- that they made, accusing the Debtor of
16 mismanaging the CLOs. And I'm sure Your Honor recalls. Your
17 Honor denied that motion on a directed verdict basis.

18 So, having been rebuffed in their attempts to try to get
19 the information that they weren't entitled to, they're now
20 proceeding under 2015.3. And, of course, Mr. Draper say he is
21 a protector of the process, the integrity of the system
22 demands it. It has nothing to do with Mr. Dondero's
23 interests, of course, because Mr. Draper is just there to make
24 sure everything runs on time and everything is done according
25 to the law, notwithstanding the fact that the U.S. Trustee

1 hasn't brought this motion, notwithstanding the fact that the
2 Unsecured Creditors' [Committee] supports our position, and
3 notwithstanding the fact that not one creditor, not one
4 unaffiliated creditor, has asked this Court for that
5 information and relief.

6 There's yet another reason, Your Honor, the Debtor
7 believes that the trusts are pursuing this motion. As Your
8 Honor is aware, the Debtor recently discovered some extremely
9 troubling information regarding a massive fraud involving a
10 previously-unknown entity called Sentinel Reinsurance. And
11 that information is the subject of an adversary proceeding
12 filed by UBS, which Your Honor heard substantial information
13 about both in connection with hearings on that motion practice
14 and also at the UBS 9019 motion.

15 The Debtor believes that the 2015.3 motion is a veiled or
16 pretty transparent effort of Dondero trying to find out what
17 the Debtor knows and what the Debtor doesn't know and trying
18 to get the Debtor to go on record with information that later
19 in litigation they will use as a judicial estoppel.

20 Your Honor, that's not an appropriate predicate for the
21 motion. Mr. Draper will deny that that's the reason, of
22 course, but I leave it for Your Honor to look at the
23 circumstances and make your own conclusions.

24 As the Court has mentioned many times, context matters,
25 and the Court should take this context into account in looking

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1 at the motion and the requested relief.

2 In our opposition, we argue that the Court should either
3 waive the 2015.3 compliance, given the anticipated effective
4 date, or continue the hearing to September 1 for a further
5 status conference if the effective date doesn't occur.

6 The burden on the estate if it was required to comply with
7 2015.3 is significant, and this goes to the issue Your Honor
8 mentioned, that, really, what's the point at this stage of the
9 case? There are more than 150 entities that arguably meet the
10 definition of substantial or controlling interest for which
11 the Debtor would be required to file reports under 2015.3. As
12 the Court knows, the Debtor is down to 12 staff, 13 if you
13 include Mr. Seery. And if those employees working with the
14 Debtor's financial advisors were required to devote the
15 necessary time and effort to prepare the reports, the time and
16 the cost it would take would be substantial. The Debtor just
17 doesn't have the bandwidth to comply.

18 More importantly, Your Honor, as we mention in our
19 opposition, Mr. Seery and the board are extremely concerned
20 with the quality of information it has received from the
21 Debtor's employees who have since been terminated by the
22 Debtor and now most of them are working for Mr. Dondero and
23 his related entities in one form or another. It's not just
24 the lawyers, as Mr. Draper says. It's the financial advisors,
25 who, in other contexts, and you'll hear a little later, are

1 coming up with new information, new defenses on notes, et
2 cetera. The Debtor has no confidence that the information in
3 its records is accurate from a financial perspective or from a
4 legal perspective.

5 As I mentioned, the Court is aware of the Sentinel cover-
6 up. And uncovering just the facts regarding Sentinel was a
7 very difficult process and required the Debtor to essentially
8 conduct discovery against itself. It just couldn't rely on
9 its information. So conducting the diligence that would be
10 required to provide accurate information for 150 entities,
11 intercompany claims, administrative claims, back and forth,
12 due-to's, due-from's, tax issues, all the stuff required by
13 the forms would be an extremely arduous task. It would take
14 millions of dollars of forensic accounting. And it wouldn't
15 -- and for what purpose? There is no purpose.

16 In addition, Your Honor, to waiving filing the reports,
17 2015.3 also allows the Court to modify the reports requirement
18 for cause when the debtor is not able, in making a good faith
19 effort, to comply with the requirements. Your Honor, in this
20 case, cause is clearly established under 2015.3.

21 Dugaboy spends a lot of time in their reply attacking the
22 cases that the Debtor cites in its opposition. While the
23 facts in those cases are different from the case here, they
24 all share something in common which is the key point: All of
25 the cases involve a waiver of the 2015.3 requirement for plans

1 that will be confirmed or will soon become effective.

2 Mr. Draper doesn't contest that this Court has the power
3 to waive. He says, well, those requests were made in the
4 first 30 days of the case or in the initial part of the case.
5 But they all granted relief where the effective date -- where
6 either the confirmation date occurred and they were waiting
7 for the effective date, or the confirmation case was -- was
8 pending.

9 And Your Honor, we would ask the Court to treat the
10 Debtor's opposition as a motion to waive the requirement under
11 2015.3. We could file a separate motion after this hearing.
12 It would be a waste of time. But we would ask Your Honor,
13 treat our opposition as a motion.

14 Dugaboy spends the rest of its time, in the papers and its
15 argument that Mr. Draper made, challenging several arguments,
16 other arguments the Debtor makes in its opposition. First,
17 they argue that there is no deadline for seeking compliance
18 and that the insinuation that we made that this is
19 gamesmanship is off base. I'll acknowledge, Your Honor,
20 2015.3 does not contain a deadline for a party seeking
21 compliance. But as I said before, context matters. And given
22 how this motion has come to be before your court, I will leave
23 it for Your Honor to determine which party is the true one
24 playing games here.

25 Second, Dugaboy argues that there's nothing confidential

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1 in any of the information required to be filed in the 2015.3
2 reports and that the disclosure of information will facilitate
3 interest in the assets and maximization of the Debtor's
4 assets. Twenty months into this case, Your Honor, no party
5 other than Mr. Dondero or his related entities has complained
6 to the Court that the Debtor is not being transparent or
7 forthcoming.

8 And there's good reason for that. Even during the early
9 stages of this case, when the Debtor and the Committee had
10 their differences, the Debtor was entirely forthcoming with
11 information about its assets, nondebtor affiliates, and
12 strategy for maximizing assets of the Debtor and its
13 affiliated entities. That collaborative effort continues
14 today, and I suspect is one of the reasons that the Committee
15 has joined in the Debtor's opposition here.

16 Similarly, the Debtor's nondebtor affiliates have
17 transacted business with third parties postpetition. The
18 Debtor has provided information to those parties as
19 appropriate, subject to nondisclosure agreement, and several
20 successful processes have been run that have maximized value.

21 And just to make clear, Your Honor, we do not believe that
22 Mr. Dondero or his related entities signed a nondisclosure
23 agreement that they would comply with the obligations. So we
24 have no interest and no desire, unless ordered by the Court,
25 either in this context or another context, to provide Mr.

1 Dondero or his related entities with information that the
2 Debtor believes would prejudice its ability to monetize
3 assets.

4 The alleged transparency that Mr. Draper and the trusts
5 seek is not borne out of a desire to open the playing field
6 and make it level and put financial information in the public
7 domain for the good of the case. It's about getting access to
8 information that the Debtor, in the exercise of its business
9 judgment -- should not be disclosed.

10 Lastly, Mr. Draper again, during oral argument, harped on
11 Mr. Seery's testimony that the reason the reports were not
12 filed is that they fell through the cracks. It's misleading.
13 He also stated that Mr. Seery said they would file the
14 reports. I've looked at the testimony. That's not what he
15 said. But he did say at confirmation that it slipped through
16 the cracks. No doubt. That's in the transcript.

17 And yes, the Debtor stands behind the fact that, in the
18 months leading to the confirmation hearing, neither Mr. Seery
19 nor the Debtor's professionals even thought about 2015.3.

20 But Your Honor, it's what has happened since that
21 justifies the Debtor's request for a waiver. The plan is soon
22 to become effective. As I said, the Debtor is down to 12
23 employees, who could not possibly prepare this information
24 without substantial time and effort. Their effort and their
25 time should be focused on monetizing assets that will put

1 money in creditors' pockets, hopefully sooner than later.

2 And on top of that, given the massive fraud that
3 management has uncovered, and continues to uncover information
4 to this day, Your Honor, on matters separate from the Sentinel
5 matter -- every week, we are finding out new information that
6 has not been made public that causes us real concern, and at
7 the appropriate time that information will be brought before
8 the Court -- the Debtors simply can't rely on that
9 information. And to be required to go through the effort to
10 put that information out in the public record so Mr. Dondero
11 can later say that the Debtor was judicially estopped, or use
12 that information for an ulterior purpose or a litigation
13 strategy, just does not make sense.

14 Based upon the foregoing, Your Honor, we would ask that
15 the Court deny the motion and grant the Debtor a waiver of the
16 2015.3 requirements.

17 Does Your Honor have any questions?

18 THE COURT: I do not think so. Well, I just -- am I
19 correct in remembering the Debtor had somewhere around 75
20 employees at the beginning of this case? And I didn't know it
21 was down to 12. I knew it was down very low. But that's what
22 we're talking about?

23 MR. POMERANTZ: Yeah, that -- that sounds about
24 right, Your Honor.

25 THE COURT: Okay.

33

1 MR. POMERANTZ: And I should mention, you know, I was
2 there at the beginning. I was there before the board. The
3 first couple months of the case, it was extremely difficult to
4 get the Debtor's employees focused on trying to get the
5 information for the 2015.3. They did not want that
6 information disclosed. And it's sort of a -- sort of a little
7 ironic that now they're here asking for disclosure.

8 But, look, we're not going to walk away from the fact
9 that, yeah, it slipped through the cracks. After the board
10 took over, Your Honor has heard many times what they did, the
11 efforts they went to. If the U.S. Trustee had approached us,
12 if Mr. Dondero had approached us early on, we would have
13 figured out a way to address that and deal with that. The
14 fact of the matter, it wasn't. The fact of the matter, it was
15 brought up as a litigation tactic on confirmation, to defeat
16 confirmation of the plan. And as I mentioned, for the
17 reasons, it's being used as a tactic now as well.

18 THE COURT: All right. Thank you.

19 MR. DRAPER: Your Honor, I -- can I -- can I make a
20 few comments?

21 THE COURT: No, not --

22 MR. DRAPER: I'll be short.

23 THE COURT: Not yet. Mr. Clemente, --

24 MR. DRAPER: Okay.

25 THE COURT: -- I neglected to mention when I was

1 taking appearances, you filed a joinder on behalf of the
2 Committee with regard to --

3 MR. CLEMENTE: That's correct, Your Honor.

4 THE COURT: So I need to hear from you next, and then
5 I'll circle back to Mr. Draper.

6 MR. CLEMENTE: That's correct, Your Honor. And just
7 for the record, Matt Clemente from Sidley Austin.

8 THE COURT: I should say, a joinder in the
9 opposition. That was a confusing statement I just made.

10 MR. CLEMENTE: Yeah, that's correct, Your Honor.

11 THE COURT: Uh-huh.

12 MR. CLEMENTE: And so I will be very brief, because
13 Mr. Pomerantz was obviously very thorough. But just to echo
14 what he said, you know, the Committee is comfortable with the
15 information that it has received. And as Your Honor knows, we
16 haven't been and won't be shy about coming to the Court if we
17 felt that that was not the case.

18 You know, we obviously had our issues early on in the
19 case, including with respect to getting information from the
20 Debtor. But, again, the Committee, you know, has been
21 comfortable with the information that it's received from the
22 Debtor.

23 Therefore, at this point, Your Honor, from the Committee's
24 perspective, there doesn't seem to be any bona fide purpose to
25 making the Debtor go through the cost and the expensive effort

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1 that Mr. Pomerantz said would be required to create the Rule
2 2015.3 reports. And, again, I -- without casting aspersions,
3 it would suggest, based on previous activity, that there's
4 really only a nefarious purpose for what is being pressed
5 before Your Honor today.

6 So, Your Honor, again, we support the Debtor's position.
7 I absolutely agree with Mr. Pomerantz's arguments. We would
8 request that Your Honor, you know, enter the relief that the
9 Debtor is requesting today.

10 THE COURT: All right. And Mr. Clemente, I just --

11 MR. CLEMENTE: Yes?

12 THE COURT: I just want to seal in my brain the
13 context that I think applies here. The January 2020 corporate
14 governance settlement order. In there, we all know there were
15 lots of protocols about lots of things, but one of them or a
16 set of the protocols dealt with transfers of assets in these
17 nondebtor subs or entities controlled by the Debtor. And, of
18 course, Mr. Pomerantz alluded to this, but I'm just going to
19 make sure I'm crystal clear on what I remember. You know, the
20 whole -- well, it was a protocol that the Committee would have
21 to be consulted on transfers of assets of those nondebtor
22 subs, those nondebtor controlled entities, and, you know,
23 there was a discussion that 363 doesn't apply, of course, to
24 nondebtor assets, and you could really argue all day, even if
25 it did apply, about whether these are ordinary course or non-

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1 ordinary course because of the business Highland is in. But
2 the Debtor negotiated with you and your clients: We're going
3 to have full transparency to let you all get notice of
4 transfers of assets of these subs, and you could even object
5 and bring a motion. I mean, you can file some sort of
6 pleading, even though we were not so sure 363 under any
7 stretch might apply.

8 Am I correctly restating the context that -- you know, Mr.
9 Pomerantz alluded to it, but I just want to make sure I'm
10 clear and the record is clear.

11 MR. CLEMENTE: Your Honor, you are -- you are
12 absolutely correct. There's a very complex set of protocols
13 that we painstakingly negotiated with the Debtor that had
14 different categories depending upon the asset --

15 THE COURT: Uh-huh.

16 MR. CLEMENTE: -- and the Debtor's ownership and its
17 relationship with respect to the nondebtor entities or the
18 related parties. That required the Debtor to come to the
19 Committee in certain sets of circumstances and explain a
20 potential transaction and get the input from the Committee,
21 and either the Committee could consent to the transaction, or
22 if the Committee did not consent to the transaction, the
23 Debtor could seek relief from the Court.

24 Your Honor will remember that, in fact, one of the
25 hearings we had with respect to the monies that were placed in

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1 the Court registry arose out of the protocols. So the
2 protocols worked from that perspective in requiring the Debtor
3 to come to the Committee, allow the Committee to make an
4 evaluation, and then the Debtor would make a decision from the
5 perspective of how it wished to proceed.

6 So, Your Honor is absolutely correct. That was all part
7 of the governance settlement that was negotiated back in
8 January. And from the Committee's perspective, again, it
9 hasn't always been lemon water and rose petals, but we believe
10 that those protocols worked, and worked to provide the
11 Committee with information so it could appropriately evaluate
12 what the Debtor was doing.

13 THE COURT: All right. So I'm correct, you would
14 say, in thinking there was a lot of transparency built in? It
15 didn't always work smoothly in the beginning, and as we know,
16 there were document production requests, many of them from the
17 Committee. That all came to a head last July, with more
18 protocols put in place. But lots of transparency was
19 negotiated by the Committee with regard to all of these
20 controlled entities and subs?

21 MR. CLEMENTE: That was a critical, Your Honor, that
22 was a critical component of the governance settlement.

23 THE COURT: Okay.

24 MR. CLEMENTE: Because that was obviously the impetus
25 for us wanting that governance settlement, so we could get

1 that transparency.

2 So, to answer your question, Your Honor, yes, the
3 protocols served that function of providing the Committee with
4 information on transactions that the Debtor was proposing to
5 enter into.

6 THE COURT: Okay. And of course, there was a waiver
7 of the privilege -- I don't know if that's the word; I guess
8 that is the right word -- with regard to possible estate
9 causes of action. Maybe I'm getting into something unrelated.
10 Maybe I'm not. But that was part of the protocol, too, right,
11 the Debtor would waive its --

12 MR. CLEMENTE: That's correct, Your Honor.

13 THE COURT: -- privilege with regard to --

14 MR. MORRIS: Your Honor, I apologize for
15 interrupting. This is John Morris from Pachulski Stang. I
16 just want to recharacterize that a bit.

17 THE COURT: Okay.

18 MR. MORRIS: It's not a waiver of the privilege. We
19 agreed to share the privilege --

20 THE COURT: Share the privilege. Okay.

21 MR. MORRIS: -- with the Debtor. The Debtor --

22 MR. CLEMENTE: I --

23 MR. MORRIS: I'm sorry to -- sorry to correct you,
24 but it's a --

25 THE COURT: Well, no, --

1 MR. MORRIS: -- very important point.

2 THE COURT: -- that's why I hesitated on that word.
3 I wasn't sure if that was the word, the concept.

4 MR. MORRIS: There's no waiver.

5 THE COURT: Okay. Okay. I'm not always --

6 MR. CLEMENTE: That is -- and that is correct, Your
7 Honor.

8 THE COURT: Okay.

9 MR. CLEMENTE: Mr. Morris is correct. As are you.

10 THE COURT: Okay. So I'm asking you, is all of this
11 protocol that was in place, I mean, is it reasonable for me to
12 think maybe that's the reason you all never pressed the 2015.3
13 issue, because you were getting a full look, as best you could
14 tell, and more? You were getting more information, perhaps,
15 than these reports would have provided, even. Is that fair
16 for me to think?

17 MR. CLEMENTE: It is fair for you to think that, Your
18 Honor. We viewed the protocols as our mechanism to get the
19 information that was necessary for the Committee to evaluate
20 the transactions that the Debtor wanted to engage in. And so
21 we were looking to the protocols, and in fact, I think the
22 protocols were very broad in certain respects, and we were not
23 thinking about the Rule 2015 reports, nor would we have said
24 that that would have been a substitute for negotiating those
25 protocols and implementing them.

40

1 THE COURT: Uh-huh.

2 MR. CLEMENTE: So that's how the Committee was
3 looking at it, Your Honor.

4 THE COURT: Okay. All right. Well, okay. Mr.
5 Draper, I'm going to come back to you. You get the last word
6 on that.

7 MR. DRAPER: Thank you. First of all, the answer is
8 yes, there are extensive protocols between the Debtor and the
9 Committee. I one hundred percent agree with you. And the
10 other point I'd make with that is this information is a
11 scaled-down version of what they're giving the Committee on a
12 regular basis. So the argument that it would take hundreds of
13 man hours and millions of dollars to do that is absolutely not
14 true. This information, in large measure, even vaster
15 portions of it have already been given to the Committee.
16 Number one.

17 Number two, we as lawyers are literalists --

18 THE COURT: But I presume not in this format. I
19 presume not in the format of filling out the form A through E
20 exhibits. I mean, maybe it's an email.

21 MR. DRAPER: Well, --

22 THE COURT: Maybe it's a phone call.

23 MR. DRAPER: -- it's not in a form -- no, there is --
24 there is -- they both have financial advisors who I'm sure
25 you're going to see whopping fee applications from who have

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1 pored through all of this. My bet, and I'd bet big dollars on
2 this, is that financial -- balance sheets are given to them on
3 a regular basis, statements of financial information for
4 subsidiaries and changes in cash flow are given to them.
5 Otherwise, there's no way the Creditors' Committee could
6 monitor what's going on and what's happening.

7 So, really, this is -- this is not a phone call thing.
8 There is real financial data that's being given that is
9 available and can be given on a scaled-down basis.

10 My real point of this is we as lawyers are literalists
11 until it suits our purposes not to be literalists. There is
12 no exception in 2015.3 for information being given to a
13 creditors' committee. In fact, when you look at 2015.3, it
14 basically figures there is information going to a creditors'
15 committee. This is for the others who don't have access to
16 that information.

17 And the interesting part of that is, as the Court's aware,
18 the Bankruptcy Code was amended that if I had gone to the
19 Creditors' Committee and made a request as a creditor, I
20 probably have a right to get even more information than 2015.3
21 allows me to get.

22 Next, which is the giant smokescreen. We're basically
23 dealing now with the gee, Mr. Dondero's a bad guy; gee, they
24 want this information because they want to uncover what we
25 know. That's just not true with respect to these reports. If

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1 you look at what the reports do, the reports start from the
2 day that the case was filed and ask for changes in financial
3 condition from the day the case was filed going forward. It
4 is all postpetition in its effect. And to the extent they've
5 uncovered things that are incorrect in the Debtor's schedules,
6 the truth is the amendment of the schedules is warranted.
7 2015.3 does not deal with prepetition activity in any way,
8 shape, or form. They are balance sheets that ask for -- or
9 changes in financial condition that go from the filing of the
10 case, or seven days before, and require reports every six
11 months.

12 So this giant smokescreen that there's a massive fraud,
13 there's all this other stuff that's been uncovered, is just
14 not true. It is an attempt to cover up or give an excuse that
15 is unwarranted with respect to why they haven't done the
16 2015.3.

17 Next point. There is no secret stuff that's being done.
18 There's no valuation that we're asking for. 2015.3 asks for
19 balance sheet information. So, in fact, if they own ten
20 pieces of property, 2015.3 would bind them together in a
21 balance sheet and say, this is the total real estate that we
22 have. If an entity has 15 entities under its umbrella, it
23 would have a balance sheet entry. Assets and liabilities.
24 It's not broken down. The assets are probably at book value
25 or some sort of mark to market.

1 But honestly, this is -- there is no way that this
2 information gives anybody any benefit in terms of any bidding.

3 And the other point that's problematic is anybody who
4 wants to buy these assets would walk in and say, look, I want
5 a data room, let me look at this. If what Mr. Pomerantz is
6 saying, which I don't understand, is that we're not going to
7 let a Dondero entity buy an asset, notwithstanding the fact
8 that they may pay more for the asset than somebody else would,
9 I think that's -- I have a huge problem with that. We're here
10 for monetization of assets. We're here to maximize the value.
11 And if, in fact, somebody walks in that may be a tangentially-
12 related Dondero entity and is willing to pay more, they should
13 be thrilled with that fact, not jettison it or disregard it.
14 That is -- their job is to maximize value, not minimize value
15 through a controlled sale process.

16 Again, I'm looking at the Code section. I'm looking at
17 2015.3. It basically says what it says. It's designed to
18 give basic financial information. It has nothing to do and
19 offers no disclosures of anything Mr. Pomerantz has thrown up
20 before the Court or that Mr. Dondero or any of his entities or
21 people are alleged to have done.

22 And the last is, if in fact there's financial information
23 that's incorrect in any of these entities, I question what the
24 Debtor's financial advisors have been doing for the last
25 months. Honestly, they should be poring over these books. If

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1 they find a problem, they should correct 'em and address them.
2 And so there's no basis under the Code. We've -- what's been
3 given to you and what their argument is is an excuse for not
4 doing something they should have done. It can't be couched as
5 to who's asking. It is systematic in nature. And what's been
6 thrown up before the Court in Mr. Pomerantz's arguments are
7 just not true when you look at what the form requires.

8 THE COURT: You know, I can't remember ever being in
9 a contested matter involving this rule. And I was kind of
10 pondering before coming out here, I wonder why that is. And,
11 you know, I'm thinking the vast majority of our complex
12 Chapter 11s that involve many, many, many entities, they all
13 file. Okay? You know, they're kind of a different animal, if
14 you will, from Highland.

15 You know, we know how it normally works. You've got maybe
16 the mothership, holding company, and many, many subs, and
17 you've got asset-based lending, right, where, you know, maybe
18 the majority of the entities in the big corporate complex are
19 liable, so you just put them all in. Okay?

20 We don't have -- I have not experienced a lot of Chapter
21 11s where you have basically just the mothership and then you
22 keep subs and lots of affiliates out. Okay? So I'm thinking
23 that's one reason.

24 Another thing, I can't remember how old this rule is.
25 Does anyone -- can anyone educate me? How long has this rule

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1 been around?

2 MR. DRAPER: Your Honor, this is Douglas. I think it
3 came in after Lehman Brothers. And it came --

4 THE COURT: Uh-huh.

5 MR. DRAPER: It was put in to deal with off-balance
6 sheet items.

7 THE COURT: Uh-huh.

8 MR. POMERANTZ: 2008, Your Honor.

9 THE COURT: 2008?

10 MR. DRAPER: Which is exactly right. It --

11 THE COURT: Okay.

12 MR. DRAPER: Yep.

13 THE COURT: Okay. So that, that's another reason.
14 Because I was thinking like *Enron* days. You know, that's a
15 big giant, a gazillion entities, and, of course, a whole huge
16 slew of them were all put in.

17 So, there's not a lot of case law. And you know, maybe
18 there are other situations where a judge ruled on this issue
19 but without issuing an opinion. So, anyway, that's neither
20 here nor there.

21 Mr. Draper, you've urged me to focus on the literal
22 wording of the rule. It's "shall" language. You've talked
23 about essentially the integrity of the system as being the
24 reason for the rule. You've told me not to accept the
25 Debtor's "bad guy" defense, you know, as an excuse. This is

1 just Dondero, you know, wanting the information, and therefore
2 I should discount the motivations here.

3 But let me tell you something that is nagging very, very
4 much at me, and I'll hear whatever response you want to give
5 to this. I just had an all-day hearing a couple of days ago,
6 and this involved the Charitable DAF entities and a contempt
7 motion the Debtor filed because those entities went into the
8 U.S. District Court upstairs in April and filed a lawsuit that
9 was all about Mr. Seery's alleged mismanagement with regard to
10 HarbourVest.

11 So what I'm really worried about is the idea that your
12 client wants this information to cobble together a new
13 adversary alleging mismanagement. How can I not be worried
14 about that?

15 MR. DRAPER: It's real simple. Because the
16 information that's here doesn't go to management decisions.
17 The information that's requested here has balance sheet items.
18 It has to do with changes in cash flow. It is not something
19 that you can cobbletogether a claim, because it doesn't deal
20 with discrete transactions. It deals with only transactions
21 between affiliated entities. It only deals with disclosure of
22 administrative expenses that are incurred by a subsidiary for
23 which the Debtor is liable. It only deals with changes in
24 condition on a go-forward basis and a balance sheet. It
25 doesn't say, gee, we have to disclose that, with respect to

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1 HarbourVest or with respect to the MGM stock or whatever,
2 we're doing A, B, or C. It doesn't go there.

3 That's why I asked the Court in my opening, look at the
4 form. Because the form is what I'm asking for adherence to.
5 I'm not asking the form to be varied. I'm just asking the
6 form to be approved -- to be addressed. And the form
7 controls. It is not something you can cobble together a
8 complaint with.

9 THE COURT: Well, you left out when I asked, you
10 know, did your client have an administrative expense claim in
11 this case, and Mr. Pomerantz corrected the record on that.
12 Your client, while it's not a lawsuit in another court, has
13 filed an administrative expense that there was mismanagement
14 of a nondebtor sub or nondebtor controlled entity, --

15 MR. DRAPER: That -- that's --

16 THE COURT: -- Multistrat.

17 MR. DRAPER: No, that's not -- if -- if I understand
18 the claim -- again, I didn't file it, and I forgot, that's an
19 oops on me as opposed to an oops on Mr. Seery for not filing,
20 and I apologize for the Court for that. But if I understand
21 that claim, is when he acquired whatever he acquired, he
22 should have offered it to the other -- to the other members of
23 the -- that group. Again, I'm not -- that's not -- I'm a
24 bankruptcy lawyer, as the Court's well aware. This other
25 stuff is beyond me.

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1 But the truth is, my understanding of the claim, it goes
2 to who should have benefited by the transaction and whether
3 the Debtor got CLO interests or got cash for it is irrelevant
4 and that it should have been offered. That's what I
5 understand the claim.

6 THE COURT: Okay. So the same sort of theory --

7 MR. DRAPER: So, the claim --

8 THE COURT: -- as HarbourVest? The same sort of
9 theory as HarbourVest?

10 MR. DRAPER: No. No. Well, no, I'm just saying,
11 that's -- that's what -- again, you're asking me for something
12 that's outside my expertise.

13 THE COURT: Okay.

14 MR. DRAPER: Yes, we may have filed a claim.

15 THE COURT: Who filed a proof of claim?

16 MR. DRAPER: And the point I'm making --

17 THE COURT: Who filed the proof of claim?

18 MR. DRAPER: What? I did not -- I have not filed the
19 proof of claims that were asserted by Dugaboy.

20 THE COURT: I mean, --

21 MR. DRAPER: I think that was --

22 THE COURT: -- request for administrative expense.
23 Who filed this? You say you don't -- you didn't file it.

24 MR. DRAPER: I did -- I don't think I did.

25 MR. POMERANTZ: Your Honor, to clarify, it was filed

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1 as a proof of claim, but it related to postpetition actions.
2 And, again, I don't have it before me. This has been raised
3 --

4 MR. DRAPER: I --

5 MR. POMERANTZ: -- several times in the confirmation
6 hearing when Mr. Draper was there, so I guess he must have
7 just forgotten about it. But I don't know who actually filed
8 it. But it is -- it is -- it is a proof of claim that is on
9 the record.

10 MR. DRAPER: Mr. Pomerantz, God forbid that I should
11 forget something. I'm sure you never have.

12 THE COURT: Okay. Well, here's what I'm going to do.
13 I'm not going to grant the relief being sought today, but I
14 will continue the hearing to a date in early September. And
15 Mr. Draper, you can coordinate with my courtroom deputy, Traci
16 Ellison, with regard to a setting in early September.

17 I can assure you it's not going to be until after Labor
18 Day. I think Labor Day falls on the 6th, maybe, and I plan to
19 be far away the first few days of September, far away from
20 this country.

21 But here are a few things I want to say. First, I care
22 about transparency, and I tend to strictly construe a rule
23 like this. I think, you know, it should be very clear for
24 anyone who's appeared before me that I really like -- I say
25 open kimono. I probably shouldn't use that expression, but I

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1 use that expression a lot. You know, when you're in Chapter
2 11, the world changes and you have to be very transparent.

3 But while I generally feel that way, we have -- as I also
4 always say, facts matter, contexts matter -- and here we are
5 twenty months into a case and we're post-confirmation. This
6 motion was filed post-confirmation. So I acknowledge that the
7 Rule 2015.3(b) has the requirement of filing reports as to
8 these nondebtor controlled entities until the effective date
9 of a plan. We're so -- we're presumably so very close to the
10 effective date that I think I should exercise my discretion
11 under Subsection (d) of this rule to, after notice and a
12 hearing, vary the reporting requirements for cause. I think
13 there's cause, and that cause is I think we're oh so close to
14 the effective date. That's number one. Number two, we're
15 down to 12 staff members. And I've heard that 150 entities
16 may be implicated, and I don't think that is a necessary and
17 reasonable use of staff members at this extremely late
18 juncture of the case.

19 And my third reason for cause under Subsection (d) of this
20 rule is we have had an active, a very active Creditors'
21 Committee in this case with sophisticated members and
22 sophisticated professionals who negotiated getting more
23 information, I think more useful information than this rule
24 even contemplates with the various form blanks.

25 Now, obviously, I'm continuing this to September because,

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1 if we don't have an effective date by early September, well,
2 context matters, maybe that causes me to view this in a whole
3 different light. But that is the ruling of the Court.

4 You know, I just want to say on behalf of the U.S.
5 Trustee, I don't know if anyone's listening in, but it was an
6 unfortunate use of words earlier, I think, saying, you know,
7 secret deal with them. And I use unfortunate words all the
8 time. I'm not being critical. But I just want to defend
9 their honor here. Oh my goodness, they --

10 (Phone ringing.)

11 THE COURT: -- exercise integrity in every case I see
12 to the utmost degree, and I suspect they were satisfied that
13 the Committee was getting so much access to the Debtor, with
14 the sharing of the privilege and the protocols, that it just
15 didn't seem necessary in the facts and circumstances of this
16 case to require strict compliance with 2015.3.

17 So I'm going to ask Mr. Pomerantz to upload a form of
18 order reflective of my ruling. And, again, if --

19 Whose phone is ringing? Is there something going on with
20 our equipment?

21 THE CLERK: No.

22 THE COURT: I don't know where that phone ringing is
23 coming from.

24 THE CLERK: I can hear it.

25 THE COURT: Okay. So, you'll get a day from Ms.

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1 Ellison in -- after labor day, and we'll see where we are.
2 This will be a moot matter as far as I'm concerned if we've
3 had an effective date at that point.

4 (Continued phone ringing.)

5 MR. POMERANTZ: Your Honor, one clarification I would
6 ask to have. I don't think -- I think Your Honor intends that
7 to be a status conference, so to save the Debtor from, you
8 know, spending time in doing a pleading, and Mr. Draper as
9 well, and Your Honor from reading them, I would say that there
10 should be no pleadings filed in advance. We will appear
11 before Your Honor with a status conference. And to the extent
12 Your Honor determines there's further briefings or further
13 issues that need to be decided, you could decide at that
14 point. But no further briefing.

15 THE COURT: Okay. I think that is a fair request.

16 (Ringing stops.)

17 THE COURT: And so that -- that is the way we'll set
18 this up. Status conference. No further pleading.

19 MR. DRAPER: Your Honor?

20 THE COURT: All right? Mr. Draper?

21 MR. DRAPER: Can I make a request, Your Honor? Can I
22 change -- can I make a comment about the Court's ruling?
23 Because I want to be transparent about this. And I think the
24 Court's ruling, I would request that you shapeshift it a
25 little bit.

1 If, in fact, you're going to take the position that if the
2 plan goes effective, this issue -- this -- this motion is moot
3 and will be denied, I think, quite frankly, why don't we enter
4 that order now, rather than waiting. Because that at least
5 gives me the ability to address the issue.

6 I don't think the rule has a waiver of it on the effective
7 date. Let's -- let's get the issue before the -- before
8 everybody. Because, again, as I said, if in fact your
9 position is that if it goes effective I'm going to deny the
10 relief and claim it's -- and assert it's moot in a ruling, I'm
11 fine, let's get the ruling now. Because -- because my
12 position is that that waiver -- there is no basis for that
13 waiver due to time. The rule requires being filed through a
14 point.

15 And, look, again, that way I'm not wasting the Court's
16 time. We're not rearguing it. If we're not having new
17 pleadings, let's get it over with.

18 MR. POMERANTZ: Your Honor, I would reject that.
19 It's pretty transparent what Mr. Draper wants. He wants
20 another appeal --

21 THE COURT: Uh-huh.

22 MR. POMERANTZ: -- because he wants to go to another
23 court, and he's unhappy that Your Honor has essentially given
24 an interlocutory order that he will be stuck with.

25 So we have, I think, close to a dozen appeals. We're

1 spending millions of dollars. And I find -- I find Mr.
2 Draper's request, quite honestly, offensive, that it would
3 require us to -- a lot more time and money on an issue we
4 shouldn't. So, I would ask Your Honor to reject Mr. Draper's
5 request.

6 THE COURT: All right. I do --

7 MR. DRAPER: And again, my --

8 THE COURT: -- reject it. That's exactly where my
9 brain went, Mr. Draper. This is an order continuing your
10 motion. Okay? And we'll have a status conference in early
11 September on your motion.

12 And you know, again, I'm just letting you know my view it
13 will be moot if the effective date has occurred, and then
14 we'll get some sort of order to that effect issued at that
15 time. And then I guess you'll have your final order that you
16 can appeal if you want at that point.

17 The last thing I'm going to say is this. Mr. Draper, as
18 I'm sure you remember, at some point many weeks back -- I
19 think it was in January, actually -- I ordered that Mr.
20 Dondero should be on the WebEx, or if we're live in the court
21 for a hearing, live in the court, any time there's a hearing
22 where he, his lawyers, have taken a position, filed an
23 objection or filed the motion himself. If he and his lawyers
24 are requesting relief or --

25 MR. DONDERO: I'm here.

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1 THE COURT: -- objecting to relief, that he has to be
2 in the courtroom.

3 I am now going to make the same requirement with regard to
4 the trusts. Any time the trusts file a pleading seeking
5 relief, object to a pleading seeking relief, file any kind of
6 position paper, I'm going to require a trust representative to
7 be in court.

8 Now, I don't know if that's the trustee, Nancy Dondero. I
9 don't know if that's Mr. Dondero's wife, a sister, who that
10 is. But it'll either be her or whoever the trustee is or Mr.
11 Dondero as beneficiary. But it has gotten to that point.
12 Okay? And --

13 MR. DRAPER: Your Honor?

14 THE COURT: And it's not -- it's not personal. I
15 have said this before. I've done this in many cases. If we
16 have a party who feels so invested in what's going on that
17 they're waging litigation, litigation, litigation, at some
18 point very often I will make this order. Like, okay, we're
19 all spending a lot of time on what you want, so you need to
20 show you're invested in it and be here with the rest of us.
21 And, you know, potentially we're going to want testimony in
22 certain contexts. Okay?

23 So I don't know who that human being is for the trusts,
24 but I'm now to the point where I'm making that same order that
25 I did with regard to Mr. Dondero personally. All right?

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1 MR. POMERANTZ: Your Honor?

2 THE COURT: Yes?

3 MR. POMERANTZ: Your Honor, just to clarify, that's
4 Mr. Dondero and the trustee.

5 And I would also ask Your Honor, I know Mr. Dondero will
6 say that he was on, and that's what Mr. Taylor is going to
7 say, he was on audio. I think, in order to have them actively
8 participating, they should be on the video the entire hearing.
9 Because if they're just on the phone on mute, Your Honor is
10 not able to really tell if they are really listening. So I
11 would ask Your Honor to clarify to both Mr. Draper and Mr.
12 Taylor that, for both the trustee and Mr. Dondero, they should
13 be on video.

14 THE COURT: All right.

15 MR. DRAPER: Your Honor, Mr. Dondero is on. You can
16 see him down in the lower screen.

17 THE COURT: All right. Just so you know, I mean, the
18 screen I'm looking at is not quite the same screen you're
19 looking at. We have this Polycom. And I show that there are,
20 you know, thirty-something people, but I only see the people
21 who have most recently talked. Okay? So, I see you, Mr.
22 Draper. I see Mr. Pomerantz. I see Mr. Clemente. A few
23 minutes ago, I saw Mr. Morris. But, you know, we've set it up
24 where I'm not overwhelmed with blocks; I'm just seeing the
25 people when they speak.

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1 MR. POMERANTZ: Your Honor, and those were the only
2 four people whose videos were on during the entire hearing.

3 THE COURT: Oh, okay.

4 MR. POMERANTZ: So I hope Mr. Draper is not going to
5 say that Mr. Dondero was on video, because he was not.

6 THE COURT: Okay.

7 MR. DRAPER: No, you can see -- Mr. Pomerantz, what I
8 said is you can see him on the screen here. You can see that
9 he has dialed in. I don't see him jumping up and down or his
10 person.

11 THE COURT: Oh, okay.

12 MR. DRAPER: But it is clear that somebody dialed in
13 on his behalf.

14 MR. POMERANTZ: Well, --

15 MR. DRAPER: Or he dialed in. He is -- he is
16 present.

17 MR. POMERANTZ: Exactly. That's my point, Your
18 Honor, that someone may have dialed in on his behalf. And I
19 think Mr. Dondero, for them to have active, meaningful
20 participation, because I think that's what Your Honor is
21 getting at, that they should be here, engaged. And if we were
22 in court like we were the other day, Mr. Dondero would have
23 had to sit in Your Honor's courtroom. And if he is going to
24 take up the time of Your Honor and all the parties, he and the
25 trustee should be really engaged, which you cannot be if

1 you're only on the phone.

2 THE COURT: Okay. All right. Well, --

3 MR. DRAPER: Your Honor?

4 THE COURT: Go ahead, Mr. Draper.

5 MR. DRAPER: Mr. Dondero just talked a few moments
6 ago, so Mr. Pomerantz heard him. This is -- this is truly
7 unwarranted. He's appeared, he's here, and he's made a
8 comment to the Court. So, again, we are invested. He was
9 present at this hearing. He heard the hearing. And so, you
10 know, I just don't know where this is coming from. I
11 understand he missed a hearing before, but he is here for this
12 one.

13 THE COURT: Okay. Well, I'm not going to get bogged
14 down in this issue. I am going to issue an order, though,
15 that is going to be reflective of what I said, and we'll just
16 -- we'll make sure we have him check in or whoever the
17 representative is of the trusts in future hearings and turn
18 the video on and we'll make sure.

19 Again, this is -- I used the word frustrated the other
20 day. I'm very frustrated. This is just -- this is -- it's
21 out of control. Okay? I ordered mediation earlier in this
22 case. I believed that an earnest effort was put in. But if
23 we're not going to have settlement of issues, you know, I'll
24 address these issues, but everyone who files a pleading,
25 whether it's Mr. Dondero personally or the trusts, the family

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1 trusts, and, of course, we're going to get -- I'm going to go
2 the same direction, actually, with all these other entities.
3 You know, it's -- I've gotten to where I had my law clerk the
4 other day prepare me basically what was like a program from a
5 sports event, you know, who represents which entities, because
6 it's gotten overwhelming. And --

7 MR. POMERANTZ: Your --

8 THE COURT: And I mentioned the other day, I'm very
9 close to requiring some sort of disclosures about the
10 ownership of each of these entities, because I -- you know,
11 the standing is just so tenuous, so tenuous with regard to
12 certain of these entities. And I've erred on the side of
13 being conservative and, you know, okay, we maybe have
14 prudential standing, constitutional standing, even if it's
15 kind of hard finding statutory standing under the Bankruptcy
16 Code. But it's gotten to the point where it's just costing
17 too much time and expense for me to not press some of these
18 issues and hold people accountable.

19 So, Mr. Pomerantz, were you about to say something? I
20 know that we had talked at another hearing about the Court
21 maybe requiring some sort of disclosures for me to really
22 understand party in interest status maybe better than I do.

23 MR. POMERANTZ: That, Your Honor, was where I was
24 going to go before Your Honor made the comment. Your Honor
25 made that comment a few weeks ago. I think, since then, quite

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1 honestly, nothing really has changed. And I think it would be
2 helpful -- it would be helpful for the Debtor, and more
3 importantly, I think it would be helpful to the Court to have
4 a list that you can refer to every time we are in a hearing of
5 every entity that has appeared that Mr. Dondero has a
6 relationship with, who the lawyers are, what the claims they
7 filed, what the status of the claims they filed, and maybe
8 even what litigation they are in pending with the Debtor.

9 We're happy with -- part of it we could prepare. But I
10 would think Your Honor should order that from Mr. Dondero's
11 related entities, because it might cut through a lot of it,
12 and give Your Honor the information Your Honor needs and the
13 context and perspective as you're hearing a lot of these
14 motions.

15 THE COURT: All right. Well, is there anything else
16 before we move on to the other matter? I'm about to close the
17 loop on this by saying I am --

18 MR. TAYLOR: Your Honor? Your Honor?

19 THE COURT: Who is that speaking?

20 MR. TAYLOR: This is Clay -- this is Clay Taylor,
21 Your Honor, --

22 THE COURT: All right.

23 MR. TAYLOR: -- representing Jim Dondero
24 individually.

25 THE COURT: Okay.

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1 MR. TAYLOR: And I just wanted to be heard. I've
2 just listened in, even though Mr. Dondero was not the movant,
3 because sometimes issues like this do come up where his name
4 is thrown about.

5 First of all, Jim Dondero was indeed, as Mr. Draper said,
6 was indeed present. He did indeed try to speak. I kind of
7 overrode him. And because, you know, he needs to speak
8 through his lawyer most of the time and shouldn't address the
9 Court directly. But I wanted to let you know that Mr. Dondero
10 was indeed on the line, was actively listening, and was
11 participating.

12 As far as additional disclosures, it would be, I would
13 just note, somewhat ironic if the Court denies the motion for
14 what appears to be mandatory disclosures under Rule 2015.3 but
15 then imposes additional disclosure requirements on somebody --
16 on another party, without any rule stating that there is such
17 disclosures. It just -- it strikes me as ironic, and I would
18 like Your Honor to consider that, at least, as Your Honor
19 says, context matters.

20 You know, that's the context in which this arises. And we
21 would just ask Your Honor to reflect upon that before she
22 imposes additional duties upon my client.

23 But there is -- and the Debtor has asked for the response
24 to be taken as a motion for leave to not comply with a rule,
25 but yet Mr. Seery is not here. The UCC regularly

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1 participates. Its members are not here. And so I just, to
2 the extent Your Honor is going to impose duties upon certain
3 parties, then what's good for the goose is good for the
4 gander, Your Honor.

5 THE COURT: All right.

6 MR. POMERANTZ: Your Honor, I would point out that
7 Mr. --

8 THE COURT: I respect your argument. I always
9 respect your arguments, Mr. Taylor.

10 By the way, you aren't wearing a jacket. You know, next
11 time you need to wear a jacket. And forgive me if I seem
12 nagging, but I'm letting you all know, if you all are soon
13 going to be having lots of litigation in the District Court, I
14 promise you the district judges are way more formal than me
15 and sticklers for every rule. You'll also be doing everything
16 live in the courtroom, too. I'm just letting you know that.

17 But while I respect your argument, apples and oranges. I
18 mean, the 2015.3 rule, not only is it not -- not -- I wouldn't
19 say mandatory, since the Court has discretion for cause to
20 waive the requirement. But it's a very onerous set of forms
21 that would have to be filled out for 150 entities by 12 staff
22 members. I don't really consider that the same as the
23 disclosure that I'm now going to require.

24 But my law clerk and I will -- we'll craft a form of order
25 that will be specific as far as what I'm going to require.

1 And, again, I think it's way beyond the point of this
2 being necessary. And just so -- again, I'm wanting to explain
3 this thoroughly. You know, standing -- for the nonlawyers; I
4 don't know how many nonlawyers are on the phone, WebEx -- it's
5 a subject matter jurisdiction thing. Okay? And, you know, if
6 there's a dispute and someone involved in a dispute
7 technically doesn't have standing, that means the Court didn't
8 have subject matter jurisdiction to be adjudicating it. Okay?
9 That's first year law school concept.

10 And it's been mentioned we have lots and lots of appeals,
11 and I can promise you, if you've never been through the
12 appellate process, that's the very first thing they'll look at
13 -- you know, District Court, Fifth Circuit, any Court of
14 Appeals -- because they have an overwhelming docket. And if
15 there's a reason to push out this appeal before then because
16 of lack of subject matter jurisdiction, which would include
17 lack of standing, of course they are going to quickly get it
18 off their plates because they have other things to get to,
19 like criminal matters that are, you know, their top priority
20 because of the Constitution.

21 So this has been an evolving thing with me. At some
22 point, I feel like the Courts of Appeals that are involved
23 with all of these appeals, they might be really, really
24 zeroing in on the standing of parties more than perhaps even I
25 have. So I want to do my job and I want it clear on the

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1 record, this is why this person has standing or doesn't have
2 standing. Okay? I just feel like we've gotten to that point.
3 And so we'll issue an order in that regard, and it will, I
4 promise you, be crystal clear.

5 Anything else?

6 MR. POMERANTZ: Your Honor, one last point. Mr.
7 Taylor insinuated that the board is not present here, which is
8 incorrect. A member or two members or three members of the
9 board have been present at every hearing before Your Honor.
10 And that's without an order requiring them to do so, because
11 they are -- they are interested, they are engaged. Mr. Dubel
12 is on the phone. He has been on the phone. I think this may
13 have been only the second hearing that Mr. Seery has missed,
14 felt it wasn't necessary to take him away from his running the
15 company. So the Debtor has been, through its board members,
16 fully engaged, and I just wanted Your Honor to know that, that
17 we would never have a hearing before Your Honor without at
18 least one member of the independent board listening in and
19 participating as necessary.

20 THE COURT: All right. Thank you.

21 All right. Well, let's move on to the other contested
22 matters, or adversary proceeding matters, I should say. And
23 they're Adversary 21-3006 and 21-3007. We have Motions for
24 Leave to Amend Answers. And do we have Ms. Drawhorn appearing
25 for that motion or those motions?

1 MS. DRAWHORN: Yes, Your Honor. Lauren Drawhorn with
2 Wick Phillips on behalf of Highland Capital Management
3 Services, Inc. and NexPoint Real Estate Partners, LLP,
4 formerly known as HCRE Partners, LLC.

5 THE COURT: All right. And who will be making the
6 argument for the Debtor on this one?

7 MR. MORRIS: John Morris, Your Honor; Pachulski Stang
8 Ziehl & Jones; for the Debtor.

9 THE COURT: All right. Are there any other
10 appearances on this?

11 Okay. Ms. Drawhorn?

12 MS. DRAWHORN: Yes, Your Honor. We are -- so, my
13 clients are seeking leave to amend the answer to add two
14 affirmative defenses. As you know, under Rule 15(a), there is
15 a bias towards granting leave, and leave should be freely
16 granted unless there's a substantial reason to deny it.

17 The main factors that are considered in determining
18 whether there is a substantial reason to deny a motion for
19 leave to amend are prejudice, bad faith, and futility.

20 Here, there is no prejudice to the Plaintiff. Under the
21 case law, if the -- as long as a proposed amendment is not
22 presented on the eve of trial, continuing deadlines or
23 reopening discovery does not constitute sufficient prejudice
24 to deny leave.

25 Here, discovery does not close until July 5th for Highland

1 Capital Management Services, and it does not close until July
2 26th for NexPoint Real Estate Partners.

3 The Plaintiff has not -- neither party has taken any
4 depositions in this case. And we are open and willing to
5 extend the discovery deadlines if necessary. We think that
6 discovery can be extended as necessary without extending any
7 dispositive motion deadline or the docket call which are set
8 in August. Dispositive motions are August 16th for Highland
9 Capital Management and September 6th for NexPoint Real Estate
10 Partners, with docket call in those cases being October and
11 November.

12 So there's significant time. If the -- if the party just
13 wants to conduct additional written discovery, I think that
14 that -- they would be easily be able to do that.

15 We're also open to continuing all the deadlines in this
16 case, and practically speaking, those -- the deadlines may be
17 continued depending on what happens with the pending motion to
18 withdraw the reference and the motion to stay.

19 So we don't think -- we don't see any reason why our
20 amended additional affirmative defenses will result in any
21 prejudice to the Plaintiff, and don't see that as a reason --
22 a substantial reason to deny the motion for leave.

23 There is no bad faith here. The motion for leave was
24 filed two months after our original answer. Again, this is
25 not a situation where we're trying to add a new defense on the

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1 eve of trial. We're not even waiting until after discovery is
2 closed to try and add this new defense. And it's not after
3 one of our prior defenses failed. Instead, we've been
4 conducting additional investigations, preparing for written
5 discovery. And as set forth in more detail in the Sauter
6 declaration that was filed yesterday, we discovered these
7 additional defenses through that additional investigation.

8 So there's certainly no bad faith here in adding these two
9 defenses. We are just trying to make sure that we can prove
10 up our defenses and prove up our case on the merits, as we
11 need to.

12 And then the last factor, the new affirmative defenses
13 we're seeking to add, they're not futile. I cited some cases
14 in the pleadings. There are some judges in the Northern
15 District of Texas that refrain from even evaluating futility
16 at this stage, at a motion for leave to amend stage,
17 preferring to address those on a motion for summary judgment
18 situation. But even when it is considered, futility looks
19 more at is there a statute of limitations that prevents the
20 claim from being successful, or does the court lack subject
21 matter on its face, based on this defense? And that's not the
22 case here.

23 The Debtor -- the Plaintiff tries to argue on the merits
24 of our affirmative defenses, and a motion for leave to amend
25 is not a basis for that. This isn't a motion for summary

1 judgment. This is just -- just a motion for leave to add
2 these defense, and they can certainly address the merits later
3 on in the case.

4 So we think we provided sufficient notice in our proposed
5 amendment. I mean, our proposed amended answer. To the
6 extent we need to add any specifics, we are certainly open to.
7 We've noted them in our reply. The ambiguity is -- is to the
8 notes as a whole. We noted the Highland Capital Management,
9 there's two notes that are signed by Frank Waterhouse without
10 indication of corporate capacity, which creates some
11 ambiguity. The notes reference other related agreements,
12 which create some ambiguity. So we think there's sufficient
13 pleading of these new defenses to support leave to amend and
14 address those on the merits.

15 And then the condition subsequent defenses, while we --
16 the schedules and the SOFAs, the notes related to that
17 reference that some loans between parties and related -- to
18 affiliates and related entities may not be enforceable, we
19 think that supports our position and this defense here, now
20 that we've furthered our investigation and heard about this
21 additional subsequent agreement that supports the condition
22 subsequent.

23 And the opposition, the Plaintiff's opposition notes that
24 there has been some discovery on this defense. It's similar
25 to one that's asserted in a related note adversary. And

1 while, again, they try to assert the merits and the
2 credibility of certain testimony, that's -- that's a decision,
3 credibility of a witness is a decision for a fact finder and
4 not for this stage of the proceedings and not for a motion for
5 leave to amend.

6 So we don't believe there's a substantial reason to deny
7 leave. Again, under Rule 15, leave should be granted freely.
8 And so we would request that the Court grant our motion for
9 leave to amend so that we can have our amended answer and
10 affirmative defenses in this case.

11 THE COURT: All right. Well, Mr. Morris, you know,
12 the law is not too much in your favor on this one. So what do
13 you have to say?

14 MR. MORRIS: I have to say a few things first, Your
15 Honor. The notes are one of the most significant assets of
16 the estate. As the Court will recall at the confirmation
17 hearing, Mr. Dondero and all of his affiliated entities
18 objected to confirmation on the ground -- challenging, among
19 other things, both the liquidation analysis as well as the
20 projections on feasibility going forward.

21 One of the assumptions in those projections and in the
22 liquidation analysis was indeed the collection of these notes
23 in 2021. They all sat on their hands, attacked the
24 projections, attacked the liquidation analysis, but never on
25 the grounds that the notes wouldn't be collectable in 2001

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1 [sic], never informing the Court that there was some agreement
2 by which collection would be called into question, never ever
3 disclosing to anybody that the plan might not be feasible or
4 the liquidation analysis might not be accurate because these
5 notes were uncollectable.

6 So what happened after that, Your Honor? We commenced
7 these actions. Actually, before the hearing. We actually
8 commenced these actions before the confirmation hearing, when
9 they sat silently on this.

10 And Mr. Dondero's first answer, because this is all very
11 important because they say that they're -- they're
12 piggybacking on Mr. Dondero. Mr. Dondero's first answer to
13 the complaint said, I don't have to pay because there is an
14 agreement by which the Debtor said they would not collect.
15 It's in the record. It's attached to my declaration. And
16 that was it. Full stop. I don't have to pay because the
17 Debtor agreed that I would not have to collect.

18 So we served a request for admission. Admit that you
19 didn't pay taxes. He realized, okay, that defense doesn't
20 work, so he changes it completely and he amends his answer.
21 Now the amended answer says, I don't -- the Debtor agreed that
22 I wouldn't have to pay based on conditions subsequent.

23 And we said, what are those conditions subsequent? Please
24 tell us in an interrogatory response. And under oath, Mr.
25 Dondero said, I don't have to pay if the Debtor sells their

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1 assets in the future. At a favorable price, I think it says.
2 Again, this is in the record. And we asked him under oath,
3 who made that agreement on behalf of the Debtor? And he said,
4 I did.

5 And Your Honor will recall that we had a hearing on that
6 very defense, on the motion to compel, where they said Mr.
7 Seery has to come in and testify to the defense that Mr.
8 Dondero made this agreement with himself. And then the
9 following week, on a Tuesday, we had the hearing on the motion
10 to withdraw the reference, and Your Honor said finish
11 discovery, because we told you discovery was going to be
12 concluded on Friday with Mr. Dondero's deposition. You know
13 what they did, Your Honor? The night before the hearing, they
14 amended Mr. Dondero's interrogatory. Again, these are sworn
15 statements. They amended it again to say he didn't enter the
16 agreement on behalf of the Debtor; Nancy Dondero, his sister,
17 did.

18 And then I took his deposition. And we're going to get to
19 that in a moment, because I'm going to put it up on the screen
20 so you can see these answers, Your Honor. And I say this by
21 way of background because it goes to both good faith -- or,
22 actually, bad faith -- as well as the lack of a bona fide
23 affirmative defense here.

24 This is -- there are five notes litigation. One against
25 Mr. Dondero. So that's package number one. And they're

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1 represented by the Stinson firm, who is signing all of these
2 things. The Stinson firm is out there claiming that in good
3 faith each of these -- each of these amendments, each of these
4 amendments to the interrogatories, are in good faith. They're
5 not in good faith, Your Honor. They're just not.

6 And the Bonds firm.

7 Then bucket two is what we have here today. That's HCRE
8 and Highland Capital Management Services. They're represented
9 by Ms. Drawhorn. I think the Stinson firm has now also
10 entered an appearance in those two adversary proceedings.

11 And the other two are against the two Advisors. More
12 entities controlled by Dondero. And Mr. Rukavina, I believe,
13 last night filed his motion to amend to add these same
14 defenses.

15 Okay? Is this good faith? I don't think this is good
16 faith.

17 Let's look at Mr. Dondero's testimony so that the Court
18 has an understanding of what we're talking about here. I
19 think I have Ms. Canty on the phone, and I'd ask her to go to
20 Page 178. 3. Just going to read (garbled) so you can see.
21 This was Mr. Dondero's testimony the day after telling me that
22 he amended his interrogatory -- sworn interrogatory answer to
23 say that he didn't enter the agreement on behalf of the Debtor
24 but Ms. -- but Ms. Dondero, his sister, did.

25 Question. Are we -- 178, please.

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1 MS. DRAWHORN: Your Honor, I would --

2 MR. MORRIS: Question. Please --

3 MS. DRAWHORN: This is not testimony in this
4 adversary and I was not -- my clients were not present at this
5 deposition that Mr. Morris is referring to, so I --

6 MR. MORRIS: Your Honor, with all due respect, she's
7 interrupting me, and I would ask her to allow me to finish my
8 presentation and then she can make whatever comments she
9 wants. Because -- because --

10 MS. DRAWHORN: Well, I'm objecting to this testimony
11 --

12 THE COURT: Okay.

13 MS. DRAWHORN: -- coming into evidence.

14 THE COURT: Okay. So your objection is -- if you
15 could just articulate your objection for the record, please,
16 Ms. Drawhorn.

17 MS. DRAWHORN: I would object to this -- this
18 deposition is not in this proceeding, this adversary
19 proceeding, either of these two the adversary proceedings, and
20 my client was not present at this deposition, so I would
21 object to it as hearsay.

22 THE COURT: Response?

23 MR. MORRIS: Your Honor, if I may, I think this --
24 this points to just one of the fundamental problems that we
25 have here. As we pointed out in our objection, the Debtor, as

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1 we sit here right now, still has no notice of the facts and
2 circumstances surrounding this alleged agreement. We still
3 don't know who entered into the agreement on behalf of the
4 Debtor. We don't know what the terms of the agreement were.
5 We don't know when the agreement was entered into. We don't
6 -- right?

7 If they're going to assert that there's an agreement --
8 and they seem to be piggybacking on this conversation between
9 Mr. Dondero and his sister. If there's a different one, they
10 need to say that right now. They need to put their cards on
11 the table and they need to inform the Debtor who entered the
12 agreement on behalf of the Debtor pursuant to which the Debtor
13 agreed to waive millions and millions of dollars without
14 telling anybody.

15 THE COURT: Okay. I overrule the objection. We can
16 go through the transcript.

17 MR. MORRIS: So, I'm just going to use part of it,
18 Your Honor. But on Lines 3 to 7:

19 "Q Did anybody else participate -- did anybody
20 participate in any of the conversations other than you
21 and your sister?

22 "A I don't believe it was necessary. It didn't
23 include anybody else."

24 Go down to Line 19, please.

25 "Q Was the agreement subject to any negotiation? Did

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1 she make any kind of -- any counterproposal of any
2 kind?

3 "A No."

4 Page 179, Line 2.

5 "Q Do you know if she sought any independent advice
6 before entering into the agreement that you have
7 described?

8 "A I don't know."

9 Line 23, please.

10 "Q Do you know if there were any resolutions that
11 were adopted by Highland to reflect the agreement
12 that's referred to in the -- in the answer?

13 "A Resolutions that -- no. Not that I'm aware of."

14 Page 180, Line 5.

15 "Q Did you give Nancy a copy of the promissory notes
16 that were a subject of the agreement?

17 "A No."

18 Continue.

19 "Q Did she ask to see any documents before entering
20 into the agreement that's referred to?

21 "A I don't remember."

22 Page 181, Line 19.

23 "Q Under the agreement that you reached with Nancy
24 that's referred to in Paragraph 40, was it your
25 understanding that Highland surrendered its right to

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1 make a demand for payment of unpaid principal and
2 interest under the notes?

3 "A Essentially, I think so."

4 Page 219. I'll just summarize 219, Your Honor. Mr.
5 Dondero has no recollection of telling Mr. Waterhouse, the
6 chief financial officer, or any other employee of Highland
7 that he'd entered into this agreement with his sister pursuant
8 to which the Debtor agreed to not collect almost \$10 million
9 of principal and interest.

10 Now let's -- let's go -- I think it's really -- because it
11 took me an awfully long time to get there. On Page 214 at
12 Lines 16 through 24. This is what the agreement was, because
13 this is -- this is -- this is his third try to describe the
14 agreement. Right? The first time -- it's just his third try,
15 and this is what the agreement is, Your Honor.

16 "Q Did you and Nancy agree in January or February
17 2019 that if Highland sold either MGM or Cornerstone or
18 Trussway for an amount that was equal to at least one
19 dollar more than cost, that Highland would forgive your
20 obligations under the three notes?

21 "A I believe that is correct."

22 That's -- that's the agreement. It took him three times
23 to get there, but look at -- look at that. He and his sister
24 did that.

25 And I do want to point out, Your Honor, that in their

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1 opposition that they filed last night, the Defendants claim
2 that Ms. Dondero was authorized because she was -- she was the
3 trustee of Dugaboy and Dugaboy holds the majority of the
4 limited partnership interests in the Debtor and therefore she
5 had the authority to enter into the agreement on behalf of the
6 Debtor.

7 There is that flippancy -- there is just that unsupported
8 statement out there. Section 4.2(b) of the limited
9 partnership agreement says, and I quote, "No limited partner
10 shall take part in the control of the partnership's business,
11 transact any business in the partnership's name, or have the
12 power to sign documents for or otherwise bind the partnership,
13 other than as specifically set forth in the agreement."

14 So I look forward to hearing what basis there was to
15 submit a document to this Court that Nancy Dondero had the
16 authority to bind the Debtor in an agreement with her brother
17 pursuant to which tens of millions of dollars was apparently
18 forgiven.

19 Can we go to Page 238? This is the last piece, Your
20 Honor. The Debtor's outside auditors were
21 PricewaterhouseCoopers. There's management representation
22 letters signed by both Mr. Dondero and Mr. Waterhouse
23 attesting that they had given their auditors all of the
24 information necessary to conduct the audit. We will get to
25 that in due course, but these are very important questions

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1 right here.

2 What page are we on? Is it 238? Okay. So, Line 16, I
3 believe.

4 "Q You knew at the time -- you knew at the time the
5 audited financials were finalized that Highland was
6 carrying on its balance sheet notes and other amounts
7 due from affiliates?

8 "A Yep."

9 And if we could just keep going, Your Honor, you will see:

10 "Q Did you personally tell anybody at
11 PricewaterhouseCoopers in connection with the
12 preparation of the audited financial statements for
13 2018 that you and your sister had entered into the
14 agreement with your sister Nancy in January or February
15 of 2019?

16 "A Not that I recall."

17 There's a lot more here, Your Honor. I'm really just
18 touching the surface. I am going to take Nancy's deposition
19 later this month. But there is -- this is wrong. This is
20 just all so wrong. For three different reasons. At least.
21 This is not a viable defense and will never be a viable
22 defense.

23 The audited financial statements carry these loans as
24 assets on the books, without qualification, and they were
25 subject to Mr. Dondero and Mr. Waterhouse's representations.

1 There is partial performance. These entities that we're
2 talking about today, they made payments on these notes. How
3 do you make payments on the notes and then come to this Court
4 and say the notes are ambiguous? How do you -- how do you
5 make payments on the notes and come to this Court and tell
6 this Court, I just learned that there was an agreement by
7 which I don't have to pay, subject to conditions precedent in
8 the future.

9 Mr. Sauter submits a declaration in support of this
10 motion. He has no personal knowledge. He states in Paragraph
11 14 that his review of the Defendants' books and records did
12 not reveal any background facts regarding the notes. Mr.
13 Dondero is the maker on all of the notes except for two of
14 them. Mr. Dondero owns and controls the Defendants. Mr.
15 Dondero was not employed or otherwise affiliated with the
16 Debtor after these actions were commenced. Mr. Sauter takes
17 Mr. Seery to task for telling the Debtor's employees not to
18 take actions that were adverse, and he uses that as his excuse
19 for not knowing these facts. He is the general counsel. He
20 was served with a complaint that alleged that his clients were
21 liable for millions and millions of dollars. His boss is
22 James Dondero. He had unfettered access to James Dondero.
23 Mr. Dondero is the one who signed the notes, except for two of
24 them. There is absolutely no excuse for not doing the
25 diligence to find out from Mr. Dondero that this defense

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1 existed.

2 And you know why it didn't happen? Because the defense is
3 not real. It is completely fabricated. It continues to
4 change and evolve every single time I -- every single time I
5 talk about these note cases, it's a new defense, it's a
6 different defense, the contours change, somebody else is
7 involved. This is an abuse of process, Your Honor. It is bad
8 faith. It just really is. And somebody's got to start to
9 take responsibility and say, I won't do this. I won't do
10 this.

11 Somebody's got to stand up and say that, because, I'm
12 telling you, it's not enough, Your Honor, that the Debtor is
13 going to collect all of its fees under the notes at the end of
14 this process. It's not enough, because we're now giving an
15 interest-free loan. These are -- these are notes that are
16 part of the Debtor's plan that nobody objected to, that nobody
17 suggested were the subject of some condition subsequent.

18 This is not your normal, you know, gee, I'd like leave to
19 amend the complaint. They're simply following what Mr.
20 Dondero did. And I would really ask the Court to press the
21 Defendants to identify specifically who made the agreement on
22 behalf of the Debtors, when was the agreement made, is there
23 any document that they know of today that reflects this
24 agreement, and what were the terms of the agreement? Is it
25 really that he would sell -- if he sells MGM for a dollar over

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1 cost, \$70 million of notes get forgiven? How is that
2 possible? How is that possible? It doesn't pass the good
3 faith test. The Court should deny the motion.

4 Thank you, Your Honor.

5 THE COURT: Mr. Morris, in all of your listing of
6 allegedly problematic things, one trail my brain was going
7 down is this: Is this adversary going to morph even further
8 to add fraudulent transfer allegations? I mean, if notes --

9 MR. MORRIS: Here's the --

10 THE COURT: -- were forgiven or agreements were made
11 --

12 MR. MORRIS: Yeah, I --

13 THE COURT: -- that they would be forgiven if, you
14 know, assets are sold at a dollar more than cost, is the
15 Debtor going to say, well, okay, if this is an agreement,
16 there was a fraudulent transfer?

17 MR. MORRIS: Your Honor, that is an excellent
18 question, one which I was discussing with my partners just
19 this morning. You know, we have to -- we're balancing a
20 number of things on our side, including the delay that that
21 might entail; including, you know, what happens if we go down
22 that path. You know, the benefit of suing under the notes, of
23 course, is that he's contractually obligated to pay all of our
24 fees.

25 And so we're balancing all of those things as these -- as

1 these defenses metastasize. But it's something that we're
2 considering, and we reserve the right to do exactly that, as
3 these defenses continue to get -- and it would be fraudulent
4 transfer, it would be breach of fiduciary duty against Nancy
5 Dondero, it would be breach of fiduciary duty against Jim
6 Dondero. I'm sure that there are other claims, Your Honor.
7 But if they want to -- if I'm forced to go down that path, I'm
8 certainly going to use every tool that I have available to
9 recover these amounts from the -- for the Debtor and their
10 creditors. This is just an abuse of process.

11 How do you -- how does one enter into agreements of this
12 type without telling your CFO, without telling your auditors,
13 without putting it in writing? And I asked Mr. Dondero, what
14 benefit did the Debtor get from all of this? And you know
15 what his answer was, Your Honor? Because it's really -- it's
16 appalling. It was going to give him heightened focus on
17 getting the job done because of this agreement that he entered
18 into with his sister, Nancy, acting on behalf of the Debtor,
19 with no information, with no documents, with no notes, with no
20 advice, with no corporate resolutions. The Debtor was going
21 to get Mr. Dondero's heightened focus to sell MGM, Trussway,
22 or Cornerstone for one dollar above cost.

23 I think the fraudulent transfer claim is probably a pretty
24 solid one. But why do we have to do this? Why do we have to
25 do this?

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1 THE COURT: Well, one of the reasons I'm asking is I
2 would not set the motion to withdraw the reference status
3 conference on an expedited basis, which I was asked to do a
4 few days ago in these two adversary proceedings, and I can't
5 remember when I've set it, but now I'm even worried, if I
6 grant this motion, is it going to be premature to have that
7 status conference in a month or so, whenever I've set it,
8 because if I grant this motion I'm wondering, am I going to
9 have your motion to amend to add fraudulent transfer claims?
10 It's -- you know, I want to give as complete a package to the
11 District Court as I can whenever I have that motion to
12 withdraw the reference.

13 All right. Ms. Drawhorn, back to you. As I said --

14 MS. DRAWHORN: Yes.

15 THE COURT: -- before inviting Mr. Morris to make his
16 argument, I know the law is very much on your clients' favor
17 as far as the law construing Rule 15(a). But my goodness, I'm
18 wondering if your client needs -- your client needs to be
19 careful what they're asking for here, after what I've just
20 heard.

21 Anyway, what -- you get the last word on this.

22 MS. DRAWHORN: Yes. Thank you, Your Honor. My
23 response is that Mr. Morris's argument was all on the merits
24 of the defenses, and certainly he is free to argue on the
25 merits, but that's not a determination for today and that's

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1 not a determination for the motion for leave to amend. That's
2 a determination for if he files a dispositive motion.

3 Like I said, we are still in the discovery phase. Mr.
4 Morris mentioned at least three parties that will be -- likely
5 be deposed and potentially give us the additional information
6 that he's asking for to support this defense. He mentioned
7 PricewaterhouseCoopers; Nancy Dondero, who he's already got
8 scheduled in a different adversary; Frank Waterhouse.

9 So it's too early, as you know, to look at the merits.
10 That's not -- that's not what's the focus of a motion for
11 leave to amend.

12 As to the -- the what amendment, what agreement, what are
13 the conditions subsequent, I believe we provided sufficient
14 information in our reply. And if the Court would like us to
15 update our proposed amended answer, if the Court is inclined
16 to grant our motion, we can certainly do that. But I think
17 the Plaintiff seems to be well aware of what the defenses are,
18 especially after his argument today on why he thinks it's not
19 a valid defense.

20 And then, on the due diligence, we did -- we did do due
21 diligence. That's why we're seeking to amend the answer,
22 obviously, and add these claims.

23 If the Court -- if the Plaintiff wants to file a motion to
24 amend later, then we can address those amendments then.

25 But I think, on the Rule 15 standard, we have met our

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1 burden and there's no substantial reason to deny the motion to
2 amend to add these defenses.

3 THE COURT: All right. By the way, have your
4 clients, have they filed proofs of claim? And I'm asking for
5 a different reason than maybe I was asking earlier. NexPoint
6 Real Estate Partners?

7 MS. DRAWHORN: They're -- NexPoint Real Estate
8 Partners, LLC, formerly known as HCRE Partners, does have a
9 proof of claim on file. It's unrelated to the notes. And it
10 is subject to a contested matter that's pending -- that's a
11 separate matter that's before the Court being addressed.

12 And then HCMS initially filed a proof of claim that was
13 objected to in the Debtor's first omnibus objection and then
14 was disallowed. There was no response to that omnibus
15 objection, so there's no longer a proof of claim for Highland
16 Capital Management Services.

17 THE COURT: Okay. Again, I'm just thinking ahead to
18 this report and recommendation I'm eventually going to have to
19 make on the motions to withdraw the reference. And as I
20 alluded to, if this morphs to the point of including
21 fraudulent transfer claims, that certainly --

22 MS. DRAWHORN: And Your Honor, one --

23 THE COURT: It's going to affect the report and
24 recommendation. And, you know, proofs of claim affect that,
25 too. So, --

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1 MS. DRAWHORN: Uh-huh. Yes. And I understand that,
2 Your Honor. And the issue, I think, with you -- we need to
3 have this motion resolved, because it -- unless the Court is
4 going to continue discovery or stay. You know, one of the
5 reasons why we had initially requested the expedited hearing
6 was because of the discovery is continued -- continuing to --
7 discovery deadlines are continuing to move. And obviously
8 whatever the Court decides on this motion for leave to amend
9 will determine what the scope of that discovery is.

10 Similarly, if the Debtor decides to amend, that could
11 change the scope of discovery as well.

12 So we are open to continuing deadlines, and I think, you
13 know, might end up filing a motion to continue. I haven't
14 conferred with Mr. Morris yet. I suspect he's opposed, based
15 on our prior conversations. But that's something that might
16 be helpful, especially if the Court is concerned on how it
17 will affect the motion to withdraw the reference, to -- maybe
18 we continue some of these upcoming deadlines, and that might
19 appease, you know, solve some of your concerns.

20 THE COURT: All right. Well, Rule 15(a), of course,
21 is the governing rule here, and the case law is abundant that
22 courts "should freely give leave when justice so requires."
23 And the law is also abundantly clear that the rule "evinces a
24 bias in favor of granting leave to amend." And again and
25 again, cases say that leave should be granted unless there's

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1 substantial reason to deny leave, and courts may consider
2 factors such as delay or prejudice to the non-movant, bad
3 faith or dilatory motives on the part of the movant, repeated
4 failure to cure deficiencies, or futility of the amendment.

5 While the Debtor has presented arguments that there might
6 be bad faith here on the part of the Movants and there might
7 be futility in allowing the amendments because of various
8 strong arguments and defenses the Debtor believes it has to
9 this issue of agreements with regard to the notes that
10 allegedly provide affirmative defenses, the Court believes the
11 rule requires me to allow leave to amend the answer.

12 Now, a couple of things. I am going to require, though,
13 that the amended answer be more specific than has been
14 suggested. I am going to agree that if new affirmative
15 defenses are made that there was this agreement to forgive
16 when certain conditions happened, then there does need to be
17 identification of who the human beings were that were involved
18 in making the agreement, the date of any agreement or
19 agreements, and disclose what documents substantiate the
20 agreement or reflect the agreement. All right? So if that
21 could --

22 MR. MORRIS: Your Honor?

23 THE COURT: Yes?

24 MR. MORRIS: John Morris. I apologize for
25 interrupting, but just a fourth thing is what is the

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1 agreement? I mean, what is the agreement?

2 THE COURT: Well, okay. That's fair enough. What is
3 the agreement? I guess --

4 MR. MORRIS: And -- and --

5 THE COURT: -- that needs to be spelled out. I mean,
6 I guess I was assuming that that would be spelled out in --
7 but maybe it's not. So we'll go ahead and add that.

8 As far as extension of the discovery, Ms. Drawhorn has
9 offered that. I think it would be reasonable if the Debtor or
10 Plaintiff wants that. Do you want an extension of discovery?

11 MR. MORRIS: What I really want, Your Honor, is a
12 direction for them to serve this amended answer within 24 or
13 48 hours and grant leave to the Debtor to promptly file
14 written discovery. We've got Nancy Dondero -- if it turns out
15 -- and maybe Ms. Drawhorn can just answer the question right
16 now. Who entered the agreement on behalf of the Debtor?
17 Because I'm already taking Nancy Dondero's deposition on the
18 28th. And it seems to me, if they would just answer the
19 question of whether Ms. Dondero is the person who did that, I
20 could just add a notice of deposition and take the deposition
21 on that date, too, and it would be, really, more efficient for
22 everybody.

23 THE COURT: Ms. Drawhorn, who was the human being?

24 MS. DRAWHORN: Yes. It was -- yes, Nancy Dondero
25 entered into the -- the subsequent agreement.

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1 MR. MORRIS: Okay. Super.

2 THE COURT: All right. You said you've already --

3 MR. MORRIS: So, --

4 THE COURT: -- got a depo scheduled of her?

5 MS. DRAWHORN: Well, what's the date --

6 MR. MORRIS: I do --

7 MS. DRAWHORN: -- Mr. Morris?

8 MR. MORRIS: I believe it's the 28th. Your co-
9 counsel can confirm, but I think it's the 28th.

10 And I'll just get another deposition notice for that one,
11 and we'll figure out a time to take Mr. Sauter's deposition,
12 too.

13 But I don't think that there is a need, frankly, for --
14 having been told by Mr. Dondero that there's no documents
15 related to this, having the Court just ordered the Defendants
16 to disclose the identity of any documents that relate to this
17 agreement, I don't think we need to extend the discovery
18 deadline at all. I can take Ms. Dondero's deposition, I can
19 take Mr. Dondero's deposition, and I can take Mr. Sauter's
20 deposition in due course over the next four weeks.

21 THE COURT: All right. Well, Ms. Drawhorn, we'll say
22 that this amended answer needs to be filed by midnight Friday
23 night, 11:59. That gives you a day and a half to get it done.
24 All right. If you could please --

25 MS. DRAWHORN: Yes, Your Honor.

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1 THE COURT: Please upload an order, Ms. Drawhorn,
2 granting your motion with these specific requirements that
3 I've orally worked in.

4 I think clients need to be careful what they ask for. I'm
5 very concerned. And I know it was just argument and I'll hear
6 evidence, but of all of the things that I guess -- well, I'm
7 concerned about a lot of things, but do we have audited
8 financial statements that didn't disclose these agreements
9 with regard to --

10 MR. MORRIS: Yes, Your Honor.

11 THE COURT: I mean, that's -- I'm just -- you know,
12 there's a lot to be concerned about on that point alone, I
13 would think. But, all right. If there's nothing further, we
14 are adjourned. Thank you.

15 THE CLERK: All rise.

16 (Proceedings concluded at 11:58 a.m.)

17 --oOo--

18

19 CERTIFICATE

20 I certify that the foregoing is a correct transcript from
21 the electronic sound recording of the proceedings in the
above-entitled matter.

22 **/s/ Kathy Rehling**

06/12/2021

23

24 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	)	Case No. 19-34054-sgj-11
	)	Chapter 11
)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	December 10, 2020
	)	9:30 a.m. Docket
Debtor.)	
)	
)	
HIGHLAND CAPITAL	)	Adversary Proceeding 20-3190-sgj
MANAGEMENT, L.P.,)	
)	
Plaintiff,	)	- MOTION FOR PRELIMINARY
	)	INJUNCTION
v.	)	- MOTION FOR TEMPORARY
	)	RESTRAINING ORDER
JAMES D. DONDERO,)	
)	
Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX/TELEPHONIC APPEARANCES:

For the Plaintiff: Jeffrey N. Pomerantz
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One South Dearborn
Chicago, IL 60603
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1 the protocols have been followed.

2 As Your Honor knows, when we've had an issue under the
3 protocols, I remember several months ago when we argued about
4 certain distributions being made, the Committee certainly was
5 not shy about bringing it to Your Honor's attention.

6 So we have been very vigilant and very diligent in holding
7 the Debtor accountable under the protocols. And we believe
8 that -- although, again, when we've had an issue, we've come
9 to Your Honor. We believe that the protocols have worked as
10 they were intended to and as they were designed, Your Honor.

11 So I can assure you that the Committee has been very
12 vigilant and the Committee will continue to be very vigilant.
13 These issues were all raised in the context of negotiating the
14 protocols. That was before Your Honor. Mr. Dondero was
15 involved with that. It was very difficult negotiations, Your
16 Honor.

17 But this does seem like somebody now trying to renegotiate
18 what it was that the parties agreed to and Your Honor approved
19 early on in this case.

20 So, Your Honor, rest assured, the Committee has been very
21 vigilant and will continue to be very vigilant.

22 THE COURT: All right. And I guess the last thing
23 I'll say on that point is, while of course we always want
24 transparency --

25 (Interruption.)

1 THE COURT: While we, of course, always want
2 transparency and notice and opportunity to object, I mean,
3 these are not your typical run-of-the-mill assets. They're
4 not a parcel of real property or a building somewhere or
5 inventory somewhere or intellectual property. I mean, these
6 are -- you know, again, we have a unique business here. And I
7 think that was very much recognized in the process of
8 negotiating the protocols, that this is not the type of
9 business where you do a 363 motion on 21 days' notice any time
10 you feel like, oh, today's a great day to trade this or that
11 in whatever fund.

12 Well, we will go forward on this motion, because Mr.
13 Dondero is entitled to his day in court to make his argument,
14 put on his evidence, and try to convince me that this is not
15 just trying to renegotiate something Mr. Dondero agreed to 11
16 months ago on the eve of confirmation. But I want to make
17 sure -- oh, we're getting --

18 (Echoing.)

19 (Clerk advises Court.)

20 THE COURT: Okay. You're on mute. You're on mute,
21 Mr. Lynn.

22 MR. LYNN: Your Honor, may I explain briefly? This
23 is very distressing. Mr. Morris says that it is the ordinary
24 course of this Debtor's business to sell a subsidiary. This
25 is not the ordinary course of the Debtor's business. There is

1 nothing in the protocols that says that the independent board
2 and just the creditors on the Creditors' Committee may make
3 decisions concerning major sales. We will present evidence to
4 that effect when it occurs, and we believe strongly -- and I
5 want to state, Your Honor, I didn't participate in
6 negotiations of those protocols. I wasn't involved. And I've
7 looked at them. There's nothing that says that this can occur
8 without going to a hearing. And there is nothing in the
9 protocols that defines ordinary course of business to involve
10 this.

11 This motion was not filed because Mr. Dondero wanted to
12 get in the way. It was filed because I thought it was the
13 right thing to do because I thought that this was contrary to
14 the way bankruptcy and Chapter 11 should work. And it was
15 reasoned by me, with Mr. Dondero's consent. And I very, very
16 much am upset to hear things people say that he's trying to
17 get in the way with this. He is not. He's asking for
18 something that is very, very, very reasonable. If they have
19 nothing to hide, and I hope they don't and don't believe they
20 do, but if the Debtor has nothing to hide, what is wrong with
21 notice and a chance for hearing?

22 MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.
23 If I briefly may be heard.

24 THE COURT: Go ahead.

25 MR. POMERANTZ: I actually did negotiate the

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1 Court next Wednesday, he needs to testify. And if NexPoint,
2 through whoever their decision-maker is, is wanting to urge a
3 position to the Court, they need a human being to testify.
4 And I'll hear Seery and I'll hear Dondero and I'll hear
5 whoever that person is, and that's what's going to matter, you
6 know, most to me. Yeah, we have some legal issues, certainly,
7 but I like to hear business people explain things, no offense
8 to the lawyers. But it's always very helpful to hear the
9 business people in addition to the lawyers. All right. So,
10 Mr. Morris, you're going to upload that TRO for me.

11 MR. MORRIS: Yes, Your Honor.

12 THE COURT: Mr. Wright, you can upload your order
13 setting your motion for hearing next Wednesday at 1:30. And I
14 think we have our game plan for now. Anything else? All
15 right. We're adjourned.

16 THE CLERK: All rise.

17 (Proceedings concluded at 11:33 a.m.)

18 --oOo--

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript to
22 the best of my ability from the electronic sound recording of
the proceedings in the above-entitled matter.

23 **/s/ Kathy Rehling**

12/11/2020

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date



EXHIBIT 33

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 17, 2021


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

ORDER REQUIRING DISCLOSURES

I. Introduction.

This Order is issued by the court *sua sponte* pursuant to Section 105 of the Bankruptcy Code and the court's inherent ability to efficiently monitor its docket and evaluate the standing of parties who ask for relief in the above-referenced case. More specifically, the Order is directed at clarifying the party-in-interest status or standing of numerous parties who are regularly filing pleadings in the above-referenced 20-month-old Chapter 11 bankruptcy case. The court has determined that there is

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

a need to: (a) fully understand whether such parties (defined below) have statutory or constitutional standing with regard to recurring matters on which they frequently file lengthy and contentious pleadings and, if so, (b) ascertain whether their interests are sufficiently aligned such that the parties might be required to file joint pleadings hence forth, rather than each file pleadings that are similar in content. The court has commented many times that certain active parties (*i.e.*, Mr. James Dondero and numerous non-debtor entities that he controls—hereinafter the “Non-Debtor Dondero-Related Entities”) seem to have tenuous standing. Mr. Dondero is, of course, the Debtor’s co-founder, former President, Chief Executive Officer (“CEO”), and indirect beneficial equity owner.² Since standing is a subject matter jurisdiction concern, the court has determined that it is in the interests of judicial economy to gain some clarity with regard to the standing of the various Non-Debtor Dondero-Related Entities. It is also in the interests of judicial economy, the interests of other parties in this case, and in the interest of reducing administrative expenses of this estate that there be consolidation of pleadings, wherever possible, of the Non-Debtor Dondero-Related Entities.

² In addition to being the former CEO, Mr. Dondero represents that he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. This court has stated on various occasions that this assertion is ostensibly true, but somewhat tenuous. Mr. Dondero filed five proofs of claim in the Debtor’s bankruptcy case. Two of those proofs of claim were withdrawn with prejudice on November 23, 2020 [DE # 1460]. The other three are unliquidated, contingent claims, each of which stated that Mr. Dondero would “update his claim in the next ninety days.” Ninety days has long-since passed since those proofs of claim were filed and Mr. Dondero has not updated those claims to this court’s knowledge. With regard to Mr. Dondero’s assertion that he is an “indirect equity security holder,” the details have been represented to the court many times to be as follows (undisputed): Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor’s Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero’s recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his indirect equity interest, the Debtor’s estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be paid.

II. Background: The Chapter 11 Case.³

On October 16, 2019 (the “Petition Date”), Highland filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Highland is a registered investment advisor that is in the business of buying, selling, and managing assets on behalf of its managed investment vehicles. It manages billions of dollars of assets—to be clear, the assets are spread out in numerous, separate fund vehicles. While the Debtor has continued to operate and manage its business as a debtor-in-possession, the role of Mr. Dondero *vis-à-vis* the Debtor was significantly limited early in the bankruptcy case and ultimately terminated. The Debtor’s current CEO is an individual selected by the creditors named James P. Seery.

Specifically, early in the case, the Official Unsecured Creditors Committee (“UCC”) and the U.S. Trustee (“UST”) desired to have a Chapter 11 Trustee appointed—absent some major change in corporate governance⁴—due to conflicts of interest and the alleged self-serving, improper acts of Mr. Dondero and possibly other officers (for example, allegedly engaging, for years, in fraudulent schemes to put Highland’s assets out of the reach of creditors). Under this pressure, the Debtor negotiated a term sheet and settlement with the UCC (the “January 2020 Corporate Governance Settlement”), which was executed by Mr. Dondero and approved by a court order on January 9, 2020 (the “January 2020 Corporate Governance Order”).⁵ The settlement and term sheet contemplated a complete overhaul of the corporate governance structure of the Debtor. Mr. Dondero resigned from his role as an officer and director of the Debtor and of its general partner. Three new independent directors (the “Independent Board”) were appointed to govern the Debtor’s

³ For a more detailed factual description of some of the disputed issues in this case, see the Memorandum of Opinion and Order Granting in Part Plaintiff’s Motion to Hold James Dondero in Civil Contempt of Court for Alleged Violation of TRO, entered June 7, 2021, DE # 190, in AP # 20-3190.

⁴ The UST was steadfast in wanting a Trustee.

⁵ See DE ## 281 & 339.

general partner Strand Advisors, Inc.—which, in turn, managed the Debtor. All of the new Independent Board members were selected by the UCC and are very experienced within either the industry in which the Debtor operates, restructuring, or both (Retired Bankruptcy Judge Russell Nelms, John Dubel, and James P. Seery). As noted above, one of the Independent Board members, James P. Seery (“Mr. Seery”), was ultimately appointed as the Debtor’s new CEO and CRO.⁶ As for Mr. Dondero, while not originally contemplated as part of the January 2020 Corporate Governance Settlement, the Debtor proposed at the hearing on the January 2020 Corporate Governance Settlement that Mr. Dondero remain on as an unpaid employee of the Debtor and also continue to serve as and retain the title of a portfolio manager for certain separate *non-Debtor* investment vehicles/entities whose funds are managed by the Debtor. The court approved this arrangement when the UCC ultimately did not oppose it. Mr. Dondero’s authority with the Debtor was subject to oversight by the Independent Board, and Mr. Seery was given authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its subsidiaries, as well as the purchase and sale of assets that the Debtor manages for various separate non-Debtor investment vehicles/entities. Significant to the court and the UCC was a provision in the order, at paragraph 9, stating that “Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.”

To be sure, this was a complex arrangement. Apparently, there were well-meaning professionals in the case that thought that having the founder and “face” behind the Highland brand still involved with the business might be value-enhancing for the Debtor and its creditors (even though Mr. Dondero was perceived as not being the type of fiduciary needed to steer the ship through bankruptcy). For sake of clarity, it should be understood that there are at least hundreds of

⁶ “CRO” means Chief Restructuring Officer. See DE # 854, entered July 16, 2020.

entities—the lawyers have sometimes said 2,000 entities—within the Highland byzantine organizational structure (sometimes referred to as the “Highland complex”), most of which are *not* subsidiaries of the Debtor, nor otherwise owned by Highland. And only Highland itself is in bankruptcy. However, these entities are very much intertwined with Highland—in that they have shared services agreements, sub-advisory agreements, payroll reimbursement agreements, or perhaps, in some cases, less formal arrangements with Highland. Through these agreements Highland (*through its own employees*) has historically provided resources such as fund managers, legal and accounting services, IT support, office space, and other overhead. Many of these non-Debtor entities appear to be under the *de facto* control of Mr. Dondero—as he is the president and portfolio manager for many or most of them—although Mr. Dondero and certain of these entities stress that these entities have board members with independent decision making power and are not the mere “puppets” of Mr. Dondero. This court has never been provided a complete organizational chart that shows ownership and affiliations of all 2,000 Non-Debtor Dondero-Related Entities, but the court has, on occasion, been shown information about some of them and is aware that a great many of them were formed in non-U.S. jurisdictions, such as the Cayman Islands.

Eventually, the Debtor’s new Independent Board and management concluded that it was untenable for Mr. Dondero to continue to be employed by the Debtor in any capacity. Various events occurred that led to the termination of his employment with the Debtor. For one thing, Mr. Dondero prominently opposed certain actions taken by the Debtor through its CEO and Independent Board including: (a) objecting to a significant settlement that the Debtor had reached in court-ordered mediation⁷ with creditors Acis Capital Management and Josh and Jennifer Terry (the “Acis

⁷ The court appointed Retired Bankruptcy Judge Allan Gropper, S.D.N.Y., and Attorney Sylvia Mayer, Houston, Texas (both with the American Arbitration Association), to be co-mediators over multiple disputes in the Bankruptcy Case, including the Acis dispute. The co-mediators, among other things, attempted to mediate disputes/issues with Mr. Dondero.

Settlement”)—which settlement helped pave the way toward a consensual Chapter 11 plan, and (b) pursuing, through one of his family trusts (the Dugaboy Investment Trust), a proof of claim alleging that the Debtor (including Mr. Seery) had mismanaged one of the Debtor’s subsidiaries, Highland Multi Strategy Credit Fund, L.P. (“MSCF”) with respect to the sale of certain of its assets during the bankruptcy case (in May of 2020).⁸ The Debtor’s Independent Board and management considered these two actions to create a conflict of interest— if Mr. Dondero was going to litigate significant issues against the Debtor in court, that was his right, but he could not continue to work for the Debtor (among other things, having access to its computers and office space) while litigating these issues with the Debtor in court.

But the termination of his employment was not the end of the friction between the Debtor and Mr. Dondero. In fact, literally a week after his termination, litigation posturing and disputes began erupting between Mr. Dondero and certain Non-Debtor Dondero-Related Entities, on the one hand, and the Debtor on the other.

At the present time, 11 adversary proceedings have been filed related to this bankruptcy case involving Non-Debtor Dondero-Related Entities. Additionally, Non-Debtor Dondero-Related entities have filed 11 appeals of bankruptcy court orders. Non-Debtor Dondero-Related entities have begun filing lawsuits relating to the bankruptcy case in other *fora* that are the subject of contempt motions.

III. The Non-Debtor Dondero-Related Entities.

The following are the Non-Debtor Dondero-Related Entities encompassed by this Order and their known counsel⁹:

⁸ See, e.g., Proof of Claim No. 177 and DE # 1154.

⁹ There are three other entities that the court is not including in this Order at this time, since, although they have appeared in the past, they are no longer active in the case because of either resolving issues with the Debtor or other reasons: (a) Highland CLO Funding Ltd. (previously represented by the law firm of King and Spaulding); (b) Hunter

A. James D. Dondero

Mr. Dondero has had three law firms representing him in the bankruptcy proceedings: Bonds Ellis Eppich Schafer Jones LLP; Stinson L.L.P.; and Crawford Wishnew Lang.

As earlier mentioned, Mr. Dondero has three pending proofs of claim that are unliquidated, contingent claims. Each of these claims state that Mr. Dondero would “update his claim in the next ninety days.” Ninety days has long-since passed since those proofs of claim were filed and Mr. Dondero has not updated those claims to this court’s knowledge. While this court is unclear what the alleged amount of Mr. Dondero’s three unliquidated, contingent proofs of claim might be, the court takes judicial notice that the Debtor has filed an adversary proceeding (Adv. Proc. # 21 - 3003) alleging that Mr. Dondero is liable to three bankruptcy estate on three demand notes, on which the total amount due and owing is \$9,004,013.07. Mr. Dondero has also been sued along with CLO Holdco, Grant Scott, Charitable DAF Holdco, Charitable DAF Fund, Highland Dallas Foundation, and the Get Good Trust for alleged fraudulent transfers in Adv. Proc. # 20-3195.

As far as equity interests in the Debtor, the Debtor is a Delaware limited partnership. The general partner is named Strand Advisors, Inc. (“Strand”). Mr. Dondero owns 100% of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner, but gave up control of Strand pursuant to a court-approved corporate governance agreement reached in this case in January 2020, to which Mr. Dondero agreed. As of the Petition Date, the Debtor’s limited partnership interests were held: (a) 99.5% by an entity called Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust (Mr. Dondero’s family trust—described below), (c) 0.0627% by the retired co-founder of the Debtor, Mark Okada, personally and through family trusts, and (d) 0.25% by Strand. These limited partnership interests were in three classes (Class A, Class B, and Class C). The

Mountain Trust (previously represented by Sullivan Hazelton Allinson and Rochelle McCullough); and (c) NexBank (previously represented by Alston & Bird).

Class A interests were held by The Dugaboy Investment Trust, Mark Okada, and Strand. The Class B and C interests were held by Hunter Mountain Investment Trust and Hunter Mountain. The significance of this is that the Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. And, of course, Mr. Dondero's recovery on his equity interest in Strand is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his indirect equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be paid.

B. The Dugaboy Investment Trust ("Dugaboy") and Get Good Nonexempt Trust ("Get Good")

The Dugaboy and Get Good Trusts are represented by the law firm Heller Draper & Horn.

Mr. Dondero is the beneficiary of Dugaboy and the settlor of Get Good (and family members are the beneficiaries). It has been represented in pleadings that Get Good is a trust established under the laws of the State of Texas. It has been represented in pleadings that Dugaboy is a trust established under the laws of the State of Delaware. At least as of the Petition Date, an individual named Grant Scott (a long-time friend of Mr. Dondero's, who is a patent lawyer and resides in Colorado) is the trustee of both. Mr. Dondero's sister may also be a trustee of Dugaboy.

As mentioned above, Dugaboy owns a 0.1866% of the Class A junior limited partnership interest in the Debtor.

Get Good has filed a proof of claim in this Bankruptcy Proceeding (submitted by Grant Scott). Dugaboy has filed several proofs of claim in this Bankruptcy Proceeding (all were submitted by Grant Scott). The court is not aware of the nature or amount of these claims, except the court has been apprised that: (a) one Dugaboy proof of claim alleges that Highland is obligated on a debt

owed to Dugaboy by an entity known as Highland Select, allegedly because Highland is Highland Select's general partner and might also be its alter ego; and (b) another proof of claim asserts postpetition mismanagement by the Debtor of assets of one or more Debtor subsidiaries. While the court knows nothing about the Get Good proof of claim, it does know that the Get Good Trust (along with others, including Grant Scott) has been sued for alleged fraudulent transfers in an adversary proceeding in this case (Adv. Proc. # 20-3195)—which may affect the allowability of its proof of claim.

C. *Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA") (sometimes collectively referred to as the "Advisors")*

These entities have been represented by the K&L Gates law firm at times and currently are represented by the law firm of Munsch Hardt Kopf & Harr. The entities are registered investment advisors that previously had shared services agreements with the Debtor.

It has been represented that Mr. Dondero directly or indirectly owns and/or effectively controls each of the Advisors. He is the President of each of them.

It is the court's understanding that both of these entities withdrew their original proofs of claim. However, the Advisors filed an application for an administrative expense claim on January 24, 2021, relating to services the Advisors allege the Debtor did not perform under a shared services agreement. The Debtor has since filed an objection to the claim and the matter is set for trial on September 28, 2021. Further, the Debtor has filed an adversary proceeding (Adv. Pro. # 21-3004) alleging that HCMFA owes the Debtor an aggregate of \$7,687,653.07 pursuant to two promissory notes and the Debtor has filed an adversary proceeding (Adv. Pro. # 21-3005) alleging that NPA owes the Debtor \$23,071,195.03 pursuant to a promissory note.

D. Highland Funds I and its series Highland Healthcare Opportunities Fund, Highland/iBoxx Senior Loan ETF, Highland Opportunistic Credit Fund, and Highland Merger Arbitrage Fund, Highland Funds II and its series Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Fixed Income Fund, and Highland Total Return Fund, NexPoint Capital, Inc., NexPoint Strategic Opportunities Fund, Highland Income Fund, Highland Global Allocation Fund, and NexPoint Real Estate Strategies Fund

These entities are represented by the K&L Gates law firm. They are apparently each managed by the Advisors and these funds are specifically managed by Mr. Dondero as portfolio manager.

The court has no idea who owns these companies (assuming they should be regarded as separate companies). The court does not know which, if any of them, have filed proofs of claims.

E. Charitable DAF Holdco, Ltd. (“DAF Holdco”), Charitable DAF Fund, LP (“DAF”), Highland Dallas Foundation, Inc., (“Highland Dallas Foundation”)

These entities are represented by the law firms of Kelly Hart Pitre and Sbaiti & Company PLLC.

It has been represented to the court that the DAF is managed by DAF Holdco, which is the managing member of the DAF. It has further been represented to the court that DAF Holdco is owned by three different purported charitable foundations: Highland Dallas Foundation, Inc., Highland Santa Barbara Foundation, Inc., and Highland Kansas City Foundation, Inc. (collectively, the “Highland Foundations”). DAF Holdco is an exempted company incorporated in the Cayman Islands. Grant Scott has apparently, until recently, served as its managing member. The DAF is an exempted company incorporated in the Cayman Islands. Highland Dallas Foundation is a Delaware nonprofit, nonstock corporation.

Mr. Dondero is the president and one of the three directors of each of the Highland Foundations. Apparently, Grant Scott was recently replaced by a former Highland employee named Mark Patrick (who is now an employee of Skyview Group, an entity created by former Highland employees). Although the Debtor is the non-discretionary investment advisor to the

DAF, the Debtor does not have the right or ability to control or direct the DAF or CLO Holdco. Instead, the DAF takes and considers investment and payment advice from the Debtor, but ultimate decisions are in the control of Mr. Patrick, presumably at Mr. Dondero's direction.

The court is not aware whether these entities have filed proofs of claim. However, they, along with Messrs. Dondero and Scott, CLO Holdco and the Get Good have been sued for fraudulent transfers in Adv. Proc. # 20-3195.

F. CLO Holdco, Ltd.

This entity was previously represented by the law firm of Kane Russell Coleman & Logan and more recently is represented by the law firm of Sbaiti & Company PLLC.

CLO Holdco is a wholly owned and controlled subsidiary of the DAF. CLO Holdco is an exempted company incorporated in the Cayman Islands. CLO Holdco has filed two proofs of claim in this Bankruptcy Proceeding. Both proofs of claim were submitted by Grant Scott in his capacity as Director of CLO Holdco.

CLO Holdco, along with Messrs. Dondero and Scott, DAF Holdco, DAF Fund, Highland Dallas Foundation, and the Get Good have been sued for fraudulent transfers in Adv. Proc. # 20-3195.

G. NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes, Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., NexPoint Real Estate Advisors VIII, L.P., and any funds advised by any of the foregoing and any of their subsidiaries (sometimes collectively referred to as "NPRE")

These entities are represented by the law firm of Wick Phillips Gould & Martin, LLP.

The entity known as HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) is alleged to owe the Debtor over \$11 million pursuant to five promissory notes (as asserted in Adv.

Pro. # 21-3007). The court understands this same entity has filed a proof of claim relating to its alleged interest in “SE Multifamily Holdings, LLC,” which has been objected to and has not been resolved.

The court has no idea who owns or manages these companies or what exact function they play in the Highland complex of companies. The court does not know anything about the substance of the proof of claims.

H. Highland Capital Management Services, Inc.

This entity appears to be represented by both Wick Phillips Gould & Martin, LLP (which also represents NPRE) and Stinson L.L.P. (which also sometimes represents Mr. Dondero personally).

This entity earlier filed two proofs of claim that were objected to and disallowed. Also, this entity is alleged to owe the Debtor approximately \$7.7 million pursuant to five different promissory notes (as asserted in Adv. Pro. # 21-3006). The court has no idea who owns or manages this company or what exact function it plays in the Highland complex of companies.

IV. Disclosure Requirement

Accordingly, in furtherance of this court’s desire to be more clear about the standing of various of these entities, and to assess whether their interests may be sufficiently aligned, in some circumstances, so as to require joint pleadings (rather than have a proliferation of similar pleadings) it is hereby **ORDERED** that:

Within 21 days of the entry of this Order, the Non-Debtor Dondero-Related Entities named in this Order shall file a Notice in this case disclosing thereon: (a) who owns the entity (showing percentages);¹⁰ (b) whether Mr. Dondero or his family trusts have either a direct or indirect

¹⁰ With regard to any minor children who may be beneficiaries of trusts, actual names should not be used (Child 1, Child 2, *etc.* would be sufficient).

ownership interest in the entity and, if so, what percentage of ultimate ownership; (c) who are the officers, directors, managers and/or trustees of the Non-Debtor Dondero-Related Entity; and (d) whether the entity is a creditor of the Debtor (explaining in reasonable detail the amount and substance of its claims).

End of Order

EXHIBIT 34

Case 3:21-cv-00879-K Document 39 Filed 02/09/22 Page 1 of 14 PageID 12647

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re: HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
Debtor	§	
_____	§	
	§	
JAMES DONDERO, <i>et al.</i> ,	§	
	§	
Appellants,	§	
	§	
v.	§	Civil Action No. 3:21-CV-0879-K
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

MEMORANDUM OPINION AND ORDER

Appellants James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC. f/k/a HCRE Partners, LLC’s (collectively “Appellants”) appeal the Bankruptcy Court’s Order Denying [Appellants’] Motion to Recuse Pursuant to 28 U.S.C. § 455 which was entered March 23, 2021. *See generally* Am. Notice of Appeal (Doc. No. 1-1); Appellants’ Br. (Doc. No. 16). Because the Court lacks jurisdiction over this appeal, the Court hereby **dismisses** this appeal.

I. Relevant Background

Appellants filed a Motion to Recuse under § 455 with the Bankruptcy Court, asking United States Bankruptcy Judge Stacey G. C. Jernigan (the “Bankruptcy Judge”) to recuse herself from presiding over the bankruptcy proceeding of Debtor Highland Capital Management, L.P. In an 11-page Order Denying Motion to Recuse Pursuant to 28 U.S.C. § 455 (“Recusal Order”), the Bankruptcy Judge denied the Motion while also reserving the right to supplement or amend the ruling. *See* Am. Notice of Appeal (Doc. No. 1-1) at 5-15. The Bankruptcy Court entered the Recusal Order on March 23, 2021. *See id.*; Appellants’ Br. (Doc. No. 16). On April 18, 2021, the Clerk of the Bankruptcy Court transmitted the Notice of Appeal filed by Appellants on April 6, 2021. *See generally* Doc. No. 1. It is the Recusal Order that forms the basis of this appeal. *See id.* Appellants designated the Bankruptcy Judge as “Appellee”. *See id.*

Before appellate briefing began, Debtor Highland Capital Management, L.P. moved the Court for leave to intervene in this appeal. *See* Mot. to Intervene (Doc. No. 2). Debtor Highland Capital Management, L.P. argued that it is the real party-in-interest, not the Bankruptcy Judge. Mot. to Intervene at 3. After the Motion to Intervene was fully briefed and ripe, the Court granted the Motion and allowed Debtor Highland Capital Management, L.P. (“Debtor/Intervenor”) to file a responsive brief as accorded to an appellee under the bankruptcy rules. *See generally* Order (Doc. No. 10).

Appellants then filed their Appellants' Brief identifying and arguing two issues on appeal: (1) whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 as untimely; and (2) whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 on the merits. Appellants' Br. at 1. Intervenor/Debtor filed an Appellee's Brief in response (Doc. No. 20), and Appellants filed their Reply Brief (Doc. No. 23). The Bankruptcy Record on Appeal does not reflect that a final judgment has been entered by the Bankruptcy Court in this matter.

Upon an initial review of the appellate briefing, the Court *sua sponte* questioned its jurisdiction over this appeal. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”). The Court issued an Order (Doc. No. 28) directing the parties to file briefs, respectively, addressing this Court's jurisdiction over an appeal of the Bankruptcy Judge's order denying a motion to recuse when final judgment has not yet been entered. The parties timely filed their respective jurisdictional briefs, and the Court has carefully considered the arguments, the applicable and binding law, and relevant portions of the record. The Court turns now to this threshold jurisdictional issue.

II. Applicable Law

Section 455 of Chapter 28 of the United States Code provides, in relevant part, that:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

28 U.S.C. § 455(a) & (b)(1). Bankruptcy Rule 5004(a) provides that “A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.” FED. R. BANKR. P. 5004(a).

District courts have jurisdiction over appeals from the following entered by a bankruptcy judge:

- (1) from final judgments, orders, and decrees;
- (2) from interlocutory orders and decrees under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
- (3) with leave of the court , from other interlocutory orders and decrees.

28 U.S.C. § 158(a).

III. Analysis

A. Recusal Order is an Interlocutory Order and Not Immediately Appealable as a Matter of Right

It is well-established law in the Fifth Circuit that a court's order denying a recusal motion is not a final order, is not an appealable interlocutory order, and is not an appealable collateral order, therefore it is reviewable on appeal only from final judgment. *Willis v. Kroger*, 263 F.3d 163, 163 (5th Cir. 2001); *United States v. Henthorn*, 68 F.3d 465, 465 (5th Cir. 1995); *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1164 n.3 (5th Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960 (5th Cir. 1980); *Martin v. Driskell*, 2021 WL 4784756, at *1 (5th Cir. July 12, 2021); *In re Gordon*, 2019 WL 11816606, at *1 (5th Cir. Apr. 10, 2019); *Stancu v. Hyatt Corp./Hyatt Regency Dallas*, Civ. Action No. 3:18-CV-1737-E-BN, 2020 WL 853859, at *2 (N.D. Tex. Jan. 30, 2020), *adopted by* 2020 WL 833645 (Feb. 20, 2020)(Brown, J.); *Prather v. Dudley*, Civ. Action No. 9:06cv100, 2006 WL 3317124, at *2 (E.D. Tex. Oct. 18, 2006); *Hardy v. Fed. Express Corp.*, No. Civ.A 97-1620, 1998 WL 104686, at *1 (E.D. La. Mar. 6, 1998). Moreover, both the Fifth Circuit and district courts in this Circuit have applied this very clear, decades-old law in appeals taken from a bankruptcy court's order denying a motion to recuse. *In re Dorsey*, 489 F. App'x 763, 764 (5th Cir. 2012); *In re Schweitzer*, Civ. Action No. 07-4036, 2007 WL

2965045, at *1 (E.D. La. Oct. 9, 2007); *In re Moerbe*, No. 03-57260-LMC/04-5043-LMC/SA-04-CA-801-FB, 2005 WL 3337634, at *3 (W.D. Tex. Sept. 1, 2005).

In this case, the Bankruptcy Record on Appeal does not establish that a final judgment has been entered. The law in the Fifth Circuit specifies that a court's order on a motion to disqualify the judge "is not an appealable final order" and "a party 'must await final judgment to appeal [a] judge's refusal to recuse.'" *In re Dorsey*, 489 F. App'x at 764 (holding court was without jurisdiction to review bankruptcy court's decision on motion to recuse because, although final judgment had been entered, the appeal of it had not yet been resolved). Appellants attempt to get around this law by arguing that the courts have considered the "finality" of an order on a motion to recuse only under 28 U.S.C. § 1291 (which applies to jurisdiction of courts of appeals over appeals from final orders of district courts) and not § 158(a) (which applies to jurisdiction of district court over appeals from bankruptcy court orders). Appellants contend this is crucial because the bankruptcy appellate statute, § 158(a), applies here and that statute contemplates the more liberal and flexible "finality" standard accorded to bankruptcy courts, rather than the finality standard under § 1291 pertaining to district court orders. Resp. Br. (Doc. No. 31) at 2-7.

The Court rejects Appellants' suggestion that the Court should or even can construe this Recusal Order under a different "finality" standard mere because the

Bankruptcy Court entered it. There is nothing in the Court’s own research, nor anything provided by Appellants, to suggest that the Court should ignore this binding precedent and apply a more liberal and flexible “finality” standard to this appeal of the Recusal Order merely because it is an order of the Bankruptcy Court. Indeed, courts in this Circuit have not hesitated in applying this well-settled law to an appeal of a bankruptcy court order on a motion to recuse. *See, e.g., In re Schweitzer*, 2007 WL 2965045, at *1 (court found jurisdiction lacking over appeal from bankruptcy court’s order denying motion to recuse because “the law is quite clear that an order denying a motion to disqualify a judge is an interlocutory order from which no appeal lies prior to final judgment in the case.”); *In re Moerbe*, 2005 WL 3337634, at *3 (“Because an order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable, it would seem to follow that the [the bankruptcy court’s] order in this case granting recusal but denying its permanency is likewise interlocutory.”). The Court finds no justification for straying from the well-settled law in the Fifth Circuit and finds that the Bankruptcy Court’s Recusal Order is not a final appealable order.

The Court also finds that the Recusal Order is not subject to the collateral order doctrine and it is not an interlocutory order that is not immediately appealable. Appellants ask the Court to treat the Recusal Order as subject to the collateral order

doctrine. The Court rejects this request as there is no legal basis for doing so. Appellants again ignore very clear Fifth Circuit law that a court order denying a recusal motion is not an appealable collateral order. *Willis*, 263 F.3d at 163 (citing *Nobby Lobby*, 970 F.2d at 85-86 & n.3); *Henthorn*, 68 F.3d at 465; *Chitimacha Tribe of La.*, 690 F.2d at 1164 n.3; *In re Corrugated Container Antitrust Litig.*, 614 F.2d at 960; *In re Dorsey*, 489 F. App'x at 764; *Martin*, 2021 WL 4784756, at *1; *In re Gordon*, 2019 WL 11816606, at *1. There is no justification to stray from this well-settled law. Moreover, the Recusal Order is not an appealable interlocutory order under § 1292(a). *Nobby Lobby*, 970 F.2d at 85-86 & n.3; *In re Dorsey*, 489 F. App'x at 764.

For these reasons, the Court finds, as it must, that the Recusal Order is an interlocutory order from which no appeal lies prior to the Bankruptcy Court entering a final judgment. *See Willis*, 263 F.3d at 163; *Nobby Lobby*, 970 F.2d at 85-86 & n.3; *In re Corrugated Container Antitrust Litig.*, 614 F.2d at 960. Therefore, the Court lacks jurisdiction over this appeal.

B. Leave to Bring an Interlocutory Appeal

Appellants' last hope for their appeal is securing leave of this Court to bring an interlocutory appeal of the Recusal Order. 28 U.S.C. § 158(a)(3) (district courts may hear appeals "with leave of the court, from other interlocutory orders" of the bankruptcy court). Appellants were required to file a motion for leave to appeal

contemporaneously with their notice of appeal. FED. R. BANKR. P. 8004(a). The motion for leave to appeal must also include certain contents. *Id.* 8004(b). Despite these unambiguous requirements of the Bankruptcy Rules, Appellants did not comply with them. Their failure, however, does not foreclose the appeal entirely because Bankruptcy Rule 8004(d) permits the Court to “treat the notice of appeal as a motion for leave and either grant it or deny it.” FED. R. BANKR. P. 8004(c). In their jurisdictional brief, Appellants ask the Court to treat their Notice of Appeal as a motion for leave to appeal should the Court find the Recusal Order is an interlocutory order. Appellants’ Resp. (Doc. No. 29) at 8. The Court turns now to this analysis.

Section 158(a)(3) does not articulate the standard a district court must use in deciding whether to grant leave in its discretion, but “[c]ourts in the Fifth Circuit . . . have applied 28 U.S.C. § 1292(b), the standard governing interlocutory appeals generally.” *In re Hallwood Energy, L.P.*, Civ. Action No. 3:12-CV-1902-G, 2013 WL 524418, at *2 (N.D. Tex. Feb. 11, 2013)(Fish, SJ) (citing *In re Ichinose*, 946 F.2d 1169, 1177 (5th Cir. 1991); *Panda Energy Int’l, Inc. v. Factory Mut. Ins.*, 2011 WL 610016, at *3 (N.D. Tex. Feb. 14, 2011)(Kinkeade, J.)); *accord Rivas v. Weisbart*, 2019 WL 5579726, at *2 (E.D. Tex. Oct. 28, 2019); *Celadon Trucking Servs., Inc. v. Moser*, 2019 WL 4226854, at *2 (E.D. Tex. Sept. 4, 2019). There are three elements of the § 1292(b) standard: “(1) a controlling issue of law must be involved; (2) the question

must be one where there is substantial ground for difference of opinion; and (3) an immediate appeal must materially advance the ultimate termination of the litigation.” *In re Ichinose*, 946 F.2d at 1177. An appeal of an interlocutory order is appropriate only where all three elements are satisfied. *See In re Genter*, Civ. Action No. 3:19-CV-1951-E, 2020 WL 3129637, at *2 (N.D. Tex. June 12, 2020)(Brown, J.) (citing *Arparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981)). “The Fifth Circuit disfavors interlocutory appeals and leave to appeal is sparingly granted.” *Id.* (internal citations omitted); *In re Hallwood Energy*, 2013 WL 524418, at *2 (“[I]nterlocutory appeals are ‘sparingly granted’ and reserved for ‘exceptional’ cases.”) (internal citations omitted). The decision whether to grant an interlocutory appeal is firmly within the district court’s discretion. *Panda Energy Int’l*, 2011 WL 610016, at *3.

In this case, there is no controlling question of law with substantial grounds for disagreement for which resolution would materially advance the end of the bankruptcy litigation. It is well-settled that a recusal motion under § 455 is left to the sound discretion of the judge. *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982); *see In re Pendergraft*, 745 F. App’x 517, 520 (5th Cir. 2018) (citing *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999)). “[C]ontrolling issue of law is one that has ‘the potential for substantially accelerating the disposition of the litigation’ and does not concern ‘matters that are entrusted to the discretion of the bankruptcy

court.” *In re Moerbe*, 2005 WL 3337634, at *4 (W.D. Tex. Sept. 1, 2005) (quoting *In re Aquatic Dev. Group, Inc.*, 196 B.R. 666, 669 (S.D.N.Y. 1996)). The Recusal Order was an exercise of the Bankruptcy Judge’s discretion, so there is no controlling issue of law presented. *Cf. In re Tullius*, 2011 WL 5006673, at *3 (W.D. Tex. Oct. 20, 2011). Appellants also cannot satisfy the second factor because the Court cannot find there exists substantial ground for difference of opinion as to the Recusal Motion.

[C]ourts have found substantial ground for difference of opinion where a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not yet spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Ryan v. Flowserve Corp., 444 F.Supp.2d 718, 723-24 (N.D. Tex. 2006)(Boyle, J.) (internal citation omitted). The Recusal Order does not fall within any of those categories. Simply because Appellants believe the Bankruptcy Court ruled incorrectly does not demonstrate substantial ground for disagreement. *Id.* at 724. Finally, the third element eludes Appellants as well. An interlocutory appeal of the Recusal Order will in no way materially advance the ultimate end to this bankruptcy matter.

The Fifth Circuit strongly disfavors interlocutory appeals and, accordingly, they are rarely granted and reserved for “exceptional cases”. *See, e.g., In re Genter*, 2020 WL 3129637, at *2. Appellants failed to satisfy any of the three § 1292(b) criteria. *Id.*

Therefore, in its discretion, the Court **denies** Appellants leave to take an interlocutory appeal of the Bankruptcy Court's Recusal Order.

Finally, the Court turns to the remaining arguments Appellants assert. First, the Court declines to *sua sponte* withdraw the reference of Appellants' motion for the bankruptcy judge to recuse herself. The case Appellants cite in support of this suggestion is inapposite here. In the unpublished Fifth Circuit opinion, *Maddox v. Cockrell*, 2003 U.S. App. LEXIS 28958 (5th Cir. 2003), the appellant sought leave to appeal the dismissal of his 28 U.S.C. § 2254 petition. *See generally Maddox v. Cockrell*, 2003 U.S. App. LEXIS 28958. The magistrate judge recommended dismissal the § 2254 petition and the district judge adopted the recommendation and dismissed the petition. *See id.* at *1-2. The Fifth Circuit did not address the merits of the dismissal, but, instead, *sua sponte* vacated the district court's final judgment and remanded with instructions to assign the case to a different district judge. *Id.* at *2. The Fifth Circuit's reasoning—the district judge was the spouse of the magistrate judge and the *pro se* prisoner likely did not know nor could he have reasonably known this. *Id.* Unlike the unusual and exceptional facts in *Maddox*, the Court does not find this appeal to justify *sua sponte* withdrawing the reference of and ruling on Appellants' motion to recuse.

The Court also finds no justification for treating Appellants' notice of appeal as a petition for writ of mandamus, which Appellants also request. A question of recusal

is reviewable on a petition for writ of mandamus. *United States v. Gregory*, 656 F.2d 1132, 1136 (5th Cir. 1981); *In re Placid Oil Co.*, 802 F.2d 783, 786 (5th Cir. 1986); *In re Cameron Int'l Corp.*, 393 F. App'x 133, 134-35 (5th Cir. 2010). “However, the writ will not lie in the absence of exceptional circumstances, and the party seeking the writ has the burden of proving a clear and indisputable right to it.” *In re Placid Oil Co.*, 802 F.2d at 786 (citing *Gregory*, 656 F.2d at 1136); accord *In re Cameron Int'l Corp.*, 393 F. App'x at 134-35. Appellants fail to make the required showing. The Court refuses to construe Appellants’ appeal as a petition for writ of mandamus.

C. Conclusion

The well-established precedent in the Fifth Circuit is that no jurisdiction lies over an appeal of a motion to recuse until final judgment has been entered. Appellants make arguments about potential inefficiency and wasted resources if they must wait to appeal the Recusal Order until the final judgment has been entered. But these arguments are not novel. The Court is certain those same arguments have been advanced in other courts considering this same issue and those courts have rejected them, as this Court does here. Appellants would have this Court carve out an exception to the well-settled law for them without any justifiable basis other than because they think the Bankruptcy Judge was wrong. Appellants must await final judgment, or other

final resolution, of their bankruptcy proceeding in order to appeal the Recusal Order.

This Court has no jurisdiction to hear this appeal.

IV. Conclusion

The Recusal Order is not a final, appealable order, is not subject to the collateral order doctrine, and is not an appealable interlocutory order under § 1292(a) and the Court is **without jurisdiction** over this appeal of the Bankruptcy Court's Recusal Order. The Court further **denies** Appellants leave to appeal the Recusal Order under § 1292(b), **denies** Appellants' request to withdraw the reference of their motion to recuse, and **denies** Appellants' request to construe their appeal as a petition for writ of mandamus. Accordingly, the Court **dismisses** this appeal for lack of jurisdiction.

SO ORDERED.

Signed February 9th, 2022.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

EXHIBIT 38

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending

6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

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1 MR. BONDS: Thank you, Your Honor.

2 (Proceedings concluded at 2:04 p.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from

the electronic sound recording of the proceedings in the

above-entitled matter.

23

/s/ Kathy Rehling

01/16/2021

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Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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) Case No. 19-34054-sgj11
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)
) Adv. Proc. No. 20-03195-sgj
)
) PLAINTIFF'S MOTION for
) CONTINUANCE
)
)
)
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)
) Adv. Proc. No. 21-03003-sgj
)
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)
) DEFENDANT DONDERO'S MOTION
) to COMPEL DISCOVERY, the
) TESTIMONY of JAMES P.
) SEERY, JR.
)
) May 20, 2021
) Dallas, Texas (Via WebEx)

For Plaintiff Highland
Capital Management,

For Defendant-Movant
James Dondero:

Bryan C. Assink
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton Street, Suite 1000
Forth Worth, Texas 76102

PALMER REPORTING SERVICES

APP. 3050

Adversary 21-3003, Motion to Compel Discovery

20

1 it just maybe fell through the cracks, and I apologize, Your
2 Honor.

3 THE COURT: All right.

4 MR. ASSINK: You know, we – Your Honor, –

5 THE COURT: Well, I'm going to say a couple of things.
6 You know this could have been raised Tuesday, when we were here
7 on the adversary proceeding, in which the preliminary injunction
8 was issued, okay, it would have been – it would have been wise,
9 it would have been very wise to raise the issue.

10 Second, it screams irony, if nothing else, that at a
11 time when I have under advisement a motion to hold Mr. Dondero
12 in contempt of Court that there would be a trip-up, the
13 second-recent trip-up, by the way, where he didn't appear at a
14 hearing. There was a time a few weeks ago, two or three weeks
15 ago, can't remember what hearing it was then, but he wasn't
16 here.

17 Okay. The –

18 MR. ASSINK: Well, Your Honor, I just want to say –

19 THE COURT: – the third thing I'm going to say – the
20 third thing I'm going to say is I guess I'll issue an order in
21 the main case now, you know, a one- or two-sentence order in the
22 main case saying repeating the sentence that was in the
23 preliminary injunction, that he's going to show up at every
24 hearing. I never said only at substantive hearings. The only
25 thing I hesitated on at all, because I've done this in other

Adversary 21-3003, Motion to Compel Discovery

21

1 cases, is sometimes I'll say any hearing at which, you know, the
2 person is taking a position, okay, an opposition, an objection,
3 you know, even if you file a pleading taking a neutral stand, if
4 he's going to file a pleading that requires the Court and all
5 the lawyers' attention to some extent, he's going to need to be
6 in court. So that's something I thought about doing, but then I
7 was reminded, that I said, no, he's just going to be at all
8 hearings in the future.

9 And procedural, substantive, I never made that
10 distinction and I never would because – because it's taking up
11 time, it's taking up time of the Court, lawyers, parties. And
12 if he is going to use the offices of this Court or, you know,
13 take up the time of any lawyers, then he needs to be a part of
14 it, okay?

15 MR. ASSINK: Your Honor, yes, I –

16 THE COURT: So I thought I made that very clear the
17 last time he didn't show up, but I think –

18 MR. ASSINK: Your Honor, I apologize. You know that's
19 certainly not our intention here. We've been rushing around. I
20 think this is more – this is more on – on me and just the fast
21 pace with everything. We would intend that he would be here at
22 all hearings. We're not trying to make any exception. We're
23 not trying to say that the preliminary injunction got rid of his
24 obligation to be before, Your Honor. You know, we weren't clear
25 exactly what the directive was for these kinds of hearings, or

The Court's Ruling on the Motion to Compel

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1 based in. And, again, no one would have better information
2 about his own compensation than Mr. Dondero himself.

3 I mean I want to stress that this comes against a
4 backdrop of – well, it seems like some antagonism, to say the
5 least, on the part of Mr. Dondero where Mr. Seery's concerned.
6 It seems like it's always a fight with Mr. Seery. And you say,
7 well, we didn't handpick him as the 30(b)(6) witness, but, you
8 know, the motion to compel names him by name. It just – it
9 feels like another antagonistic move.

10 You've got him for a deposition next Monday on 13 or
11 so different topics. I think it is appropriate to draw the line
12 on these six or so topics that again just don't seem relevant or
13 proportional to the needs of the case.

14 All right. So, Mr. Morris, would you please upload
15 just a simple order reflecting the Court's ruling?

16 MR. MORRIS: I would be happy to, Your Honor.

17 THE COURT: Okay. Actually I'm going to ask Mr. Aigen
18 to do it. I'm sorry. I need to be thinking about attorney's
19 fees and who should bear the costs of what.

20 So, Mr. Aigen, would you please electronically submit
21 an order?

22 MR. AIGEN: Yes.

23 THE COURT: All right. Thank you.

24 All right. Well, if there's nothing else on this
25 particular adversary, let me just double check. Any

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated May 22, 2021

1 Can everyone hear me okay? I don't know if we're having
2 connectivity issues. Can everyone hear me?

3 MR. MORRIS: Yes, Your Honor.

4 THE COURT: Can you hear me, Mr. Wilson?

5 MR. MORRIS: Yes, Your Honor.

6 MR. WILSON: Yes, Your Honor.

7 THE COURT: Okay. I have been pondering something
8 the past few days. And I haven't figured out how I want to
9 address it, but maybe Mr. Dondero's counsel and counsel from
10 some of the Dondero-controlled entities, maybe they can listen
11 to what I'm about to say and figure out a solution.

12 As you all know, there are so many law firms, so many
13 lawyers involved now that are basically singing the same tune
14 at a lot of these hearings as far as objections, me too, me
15 too, me too. And so just quickly eyeballing what we have, we
16 obviously have Mr. Dondero represented by Bonds Ellis. There
17 is another firm that represents Mr. Dondero that filed a
18 motion asking that I recuse myself. I can't remember the name
19 of that firm, but I think they appealed my denial of that
20 motion. So, I can't remember who that was. Then we have the
21 various affiliates. We have -- well, I'll just start
22 chronologically. Highland CLO Funding, Ltd. has historically
23 been represented by King & Spalding. I don't know if that's
24 -- I know there were some changes there with the ownership of
25 that entity, so maybe they're gone. But then we have NexPoint

1 Advisors and Highland Capital Management Fund Advisors. We
2 call them the Advisors and then the Funds. Originally, they
3 were all represented by K&L Gates, but now they've divvied it
4 up and Munsch Hardt is representing, I guess, the Advisors,
5 and the Funds are represented by K&L Gates. CLO Holdco, Ltd.,
6 it was Kane Russell Coleman & Logan representing them, but I
7 now think I'm seeing Kane Russell is representing Grant Scott
8 and -- individually. I'm not sure if Kane Russell is still
9 representing CLO Holdco. We have Dugaboy and Get Good Trusts
10 represented by Doug Draper, Heller Draper. We have now Louis
11 Phillips representing the Charitable DAFs, Highland Dallas
12 Foundation. We have NexPoint Real Estate Partners represented
13 by Wick Phillips, although there's the motion to disqualify
14 them. And then I guess I'll just throw in we've had Baker &
15 McKenzie and Ross & Smith representing certain groups of
16 employees, but now I guess those proofs of claim have been
17 bought by Dondero entities and so I'm not sure who's
18 representing who there.

19 I'm not even sure I got everyone just now, but here's what
20 I'm getting at. You talk about judicial efficiency and
21 judicial economy and economy of the partners. We can't go on
22 efficiently with 12 law firms or whatever I just named filing
23 the very same type of motion or objection. You know, I almost
24 -- if we were in different circumstances, I'd say we need to
25 have an ad hoc committee of these Dondero-controlled

1 affiliates, something like that.

2 But I've been thinking about this for a few days because I
3 see, like in one adversary, I think we now have three motions
4 to withdraw the reference. And I haven't studied them all,
5 but I'm pretty sure they're going to tell me the exact same
6 thing. And again, I'm just doing some predictions that the
7 UBS settlement, I wouldn't be surprised if I get eight or ten
8 or twelve objections that say the very same thing.

9 We're going to have to work something out. Okay? This is
10 not efficient. It's not useful. I would think a person such
11 as Mr. Dondero would want to rein in legal fees, but maybe
12 not.

13 Do you all have any ideas, Mr. Taylor, Mr. Wilson? How
14 can we rein this in? There's got to be a better way --

15 MR. TAYLOR: Your Honor?

16 THE COURT: -- than twelve different law firms filing
17 almost identical pleadings.

18 MR. TAYLOR: Your Honor, I understand what you're
19 saying, on the one hand. On the other hand, each of these
20 entities do have -- are separate corporations. They have
21 different duties to various stakeholders, and they are
22 controlled by different stakeholders. And that is one of the
23 things that has been a consistent, at least from what I
24 understand from my limited understanding and length of time in
25 the case, that that is one thing that is very important to Mr.

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1 Dondero and those related entities, is that those duties do
2 run to different parties. So each party has to preserve its
3 individual rights.

4 Sure. Could it be more efficient? Of course. But Mr.
5 Dondero has a different set of duties than do the Advisor,
6 than do the Funds, than do the Trusts that are controlled by a
7 separate trustee. And while of course there's some
8 interrelated cooperation amongst them, amongst the joint
9 defense agreement, it is very important that they maintain
10 their separate corporate identities and act independently from
11 each other, because they truly do have to act independently
12 from each other in many different circumstances. They don't
13 want to lose sight of that.

14 So that is my initial explanation. Of course, I can talk
15 with my client about it further, about seeing what can be
16 done, because he does indeed want to make it more efficient.
17 Has been hammering on me and my firm every month to try to do
18 so, and I'm sure he has with the other professionals.

19 But we do hear Your Honor, but we do want to make sure
20 that that -- those different separate corporate identities of
21 these entities is both recognized and laid out in this case.
22 It is very important to us and just integral to a lot of the
23 things that we've done in this case.

24 THE COURT: You know what would help me understand
25 that better? Is if in every case I had this entity is owned

1 by, you know, 25 percent by this, this. If I knew the owners,
2 if I knew the equitable owners. But I don't. That's just all
3 kind of glossed over. And so that's how perceptions get
4 created that Dondero, Dondero, Dondero, Dondero. You know
5 what I'm saying?

6 MR. DONDERO: Your Honor?

7 THE COURT: And I don't know if you want to share
8 that information or not, but that's why I can't just accept a
9 generalization that, oh, we have very different stakeholders
10 behind --

11 MR. TAYLOR: Your Honor? Wait, hold on a second.
12 Your Honor, --

13 THE COURT: -- this entity versus this one versus
14 this one.

15 MR. TAYLOR: Your Honor, if you would allow my
16 client, he would like to very briefly address the Court on
17 those points, if he may.

18 THE COURT: Okay.

19 MR. DONDERO: Your Honor, just a brief history from
20 my perspective, okay? We filed with \$450 million of assets
21 and \$110 million of estimated, as presented by the independent
22 board and Pachulski to the Court, trying to do a quick
23 settlement the first three or four months into bankruptcy.
24 The claims, the awards, the Class 8, the Class 9 awards, the
25 people who didn't even have standing, have all of a sudden

1 ballooned to \$300-some-odd million. And the assets in the
2 estate, which we haven't had an examiner go through all these
3 no-process asset sales at a loss, when I would have bought
4 them for more, has driven the estate value down to less than
5 \$250 million.

6 We made an offer to try and settle this thing a few months
7 ago at 20 percent more than the estimated value in the
8 recoveries. But Seery and the UCC are emboldened because they
9 feel in this Court there's going to be no respect of third-
10 party investors, no respect of other Dondero entities, and
11 they've been told that they can get more than a hundred cent
12 recovery by going after me and all my other entities going
13 back ten or twelve years.

14 So there's no chance that this case ever settles. And
15 what you're going to see is there's a half a dozen or more --

16 MR. POMERANTZ: Your Honor, I have to -- I have to --

17 MR. DONDERO: -- there's a half a dozen more law
18 firms coming --

19 THE COURT: Just a moment.

20 MR. DONDERO: -- and there's a half a dozen -- there
21 are a half a dozen more --

22 MR. POMERANTZ: Your Honor, this --

23 THE COURT: Mr. Morris?

24 MR. POMERANTZ: This is Jeff Pomerantz.

25 THE COURT: Mr. Morris?

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1 MR. POMERANTZ: This is Jeff Pomerantz, Your Honor.

2 THE COURT: Oh, Mr. Pomerantz?

3 MR. POMERANTZ: This is Jeff Pomerantz, Your Honor.

4 THE COURT: Uh-huh.

5 MR. POMERANTZ: You know, I think what Mr. Dondero is
6 doing is totally inappropriate. We're not here to relitigate
7 the history of the case. We're not here to relitigate or
8 determine why a settlement hasn't been reached. Your Honor
9 raised some important questions, (garbled) gave an answer, you
10 pushed him, but what Mr. Dondero is doing is just
11 inappropriate, and we shouldn't -- don't think he should be
12 doing this in this manner.

13 If he wants to at some point be put on to testify, he
14 could be cross-examined. But he's testifying about things
15 that actually just happen not to be true and it's totally
16 inappropriate for this context.

17 THE COURT: Okay. Well, I understand --

18 MR. DONDERO: But Your Honor, there's going to a half
19 dozen --

20 THE COURT: -- that -- I understand, you know, Mr.
21 Pomerantz is concerned because I asked a specific question
22 aimed at how do we rein in all the lawyers, and the answer
23 was, well, they all are separate entities with separate
24 interests and separate stakeholders. And my question was,
25 well, could I maybe see a list, a breakdown on all of these

1 entities? Because, you know, in so many cases, --

2 MR. DONDERO: But Your Honor, --

3 THE COURT: -- in almost every case I have, I get a
4 big giant what I call spaghetti chart at the beginning of the
5 case where I get a breakdown of debtor affiliates and who owns
6 what. And this hasn't been clear to me with all of these
7 affiliates.

8 But I do very much have the impression, Mr. Dondero, that
9 all roads lead back to you. So I let you speak to this, and
10 we've kind of gone down a different trail. And I want you to
11 know, I know --

12 MR. DONDERO: Right.

13 THE COURT: I know where you stand on this because
14 you have told me before. You have huge concern that Highland
15 had x hundred million dollars of assets at the beginning of
16 the case and now it's a lot lower. I know you have concerns
17 with liquidation at what you think were very inappropriate
18 times. I know you have all kinds of beefs, beefs about the
19 settlement with Acis, and probably UBS and the Redeemer
20 Committee. I understand that. But what I'm talking about
21 right now is going forward. Going forward, how do we rein
22 this in where we don't --

23 MR. DONDERO: But going forward, there's going to be
24 more lawyers. There's going to be more defense. Because the
25 Debtor is just going to keep trying to broaden, because they

1 feel empowered and enabled to go after anything related to
2 Highland, me, et cetera. But there's probably half a dozen
3 more attorneys coming into this case. I don't know what to
4 tell you. It's a circus.

5 THE COURT: Okay. Well, I'm going to let you all
6 think about this out of court. Is there a way you can
7 streamline? I mean, I know -- I almost chuckle at myself at
8 saying ad hoc committee of Dondero-controlled entities. I
9 know that that sort of sounds, I don't know, unworkable,
10 maybe. Maybe not. I'm not going to read 14 different
11 objections to the UBS settlement that say the very same thing.
12 I'm not going to read a different motion to withdraw the
13 reference by every single defendant in every single adversary
14 that gets filed. This is just not an efficient way to go
15 forward.

16 So I want you all to think about how you can make this
17 more efficient. You know, it -- a perception could exist that
18 you're trying to carpet-bomb us all with paper, the Court
19 included. I mean, it's my job. I'm going to read everything
20 that's put before me. That's what I do. That's what I'm
21 supposed to do. But it's out of control. So you all think of
22 a way to get it in control or I might impose something. The
23 wheels are turning. What could I do? You know, page limits.

24 MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.
25 One suggestion might be, following up on what Your Honor made

1 some comments about, and Your Honor has used the word ad hoc
2 committees, and obviously it's sort of a different animal
3 here. But as Your Honor knows, that every time an ad hoc
4 committee comes in, they have to file a 2019 statement. So I
5 think it would at least provide Your Honor with information,
6 as it would provide all of us with information, to really
7 understand and know, when people are appearing, is it all
8 roads leading back to Dondero, or, as Mr. Taylor says, what
9 are the different constituents? Who are the different people?

10 As Your Honor has heard from us, we lump them all together
11 because we believe the evidence has shown throughout this case
12 that it all leads -- the road leads back to Dondero. But Your
13 Honor may consider asking them to file sort of the equivalent
14 of a 2019 statement to provide Your Honor with that
15 information under oath that Your Honor could then see, when
16 you get several objections to the same thing, whether you
17 really need to be dealing with them as seven different matters
18 or whether dealing with them as one.

19 THE COURT: Okay. All right. Well, I'm giving this
20 thought. And again, I'll let you all think about it and make
21 a proposal. But I may or may not accept any proposal you
22 make. And I am leaning towards requiring information to be
23 filed of who owns what, who are the stakeholders. That'll
24 help me understand, is it necessary to have this entity filing
25 a separate objection or motion from this other entity or not?

1 Can we just have an hoc committee each time?

2 I don't even think I listed all the law firms. I know a
3 new law firm filed a lawsuit in front of Judge Jane Boyle
4 recently. We've got a hearing on that coming up in June. I
5 mean, and now you're -- I'm hearing there are going to be
6 more. Well, if you don't figure out a way to rein it in, then
7 I'm just going to have to get that list of who are the
8 stakeholders in these entities, under oath, because I don't
9 understand it. I don't understand why we need these many
10 lawyers filing position papers.

11 So, all right. Well, we're going to adjourn, and I guess
12 I'll see you next Monday, right?

13 MR. MORRIS: Thank you, Your Honor. Yes.

14 THE COURT: Okay. Thank you.

15 THE CLERK: All rise.

16 (Proceedings concluded at 3:07 p.m.)

17 --oOo--

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20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

05/11/2021

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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3 new law firm filed a lawsuit in front of Judge Jane Boyle
4 recently. We've got a hearing on that coming up in June. I
5 mean, and now you're -- I'm hearing there are going to be
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8 stakeholders in these entities, under oath, because I don't
9 understand it. I don't understand why we need these many
10 lawyers filing position papers.

11 So, all right. Well, we're going to adjourn, and I guess
12 I'll see you next Monday, right?

13 MR. MORRIS: Thank you, Your Honor. Yes.

14 THE COURT: Okay. Thank you.

15 THE CLERK: All rise.

16 (Proceedings concluded at 3:07 p.m.)

17 --oOo--

18

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

05/11/2021

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

EXHIBIT 41

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
 HIGHLAND CAPITAL) Dallas, Texas
 MANAGEMENT, L.P.,) Friday, June 25, 2021
) 9:30 a.m. Docket
 Debtor.)
) EXCERPT: MOTION FOR
) MODIFICATION OF ORDER
) AUTHORIZING RETENTION OF JAMES
) P. SEERY, JR. DUE TO LACK OF
) SUBJECT MATTER JURISDICTION
) (2248)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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For CLO Holdco, Ltd. and Jonathan E. Bridges
 The Charitable DAF Fund, Mazin Ahmad Sbaiti
 LP: SBAITI & COMPANY, PLLC
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 Dallas, TX 75201
 (214) 432-2899

For Get Good Trust and Douglas S. Draper
 Dugaboy Investment Trust: HELLER, DRAPER & HORN, LLC
 650 Poydras Street, Suite 2500
 New Orleans, LA 70130
 (504) 299-3300

1 bring causes of action against persons, such as officers and
2 directors or other third parties, if they first come to the
3 Bankruptcy Court and show a colorable claim. They have to
4 come to the Bankruptcy Court, show they have a colorable claim
5 and they're the ones that should be able to pursue them. Not
6 exactly on point, but it's just one of many cases that one
7 could cite that certainly approve gatekeeper functions of
8 various sorts of Bankruptcy Courts.

9 It doesn't matter which court might ultimately adjudicate
10 the claims; the Bankruptcy Court can be the gatekeeper.

11 And the Court agrees with the many cases cited from
12 outside this circuit, such as the case in Alabama, in the
13 Eleventh Circuit, and there was another circuit-level case, at
14 least one other, that have held that the *Barton* doctrine
15 should be extended to other types of case fiduciaries, such as
16 debtor-in-possession management, among others.

17 Finally, as I pointed out in my confirmation ruling in
18 this case, gatekeeping provisions are commonplace for all
19 types of courts, not just Bankruptcy Courts, when vexatious
20 litigants are involved. I have commented before that we seem
21 to have vexatious litigation behavior with regard to Mr.
22 Dondero and his many controlled entities.

23 Now, as far as the Movants' argument that there was not
24 just improper gatekeeping provisions but actually an improper
25 discharge in the Seery retention order of negligence claims or

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1 annoyance or anything like that. I guess what I'm trying to
2 do is I don't want anyone to mistake the delay in ruling on
3 the contempt motion to mean I'm just not that -- you know, I'm
4 not prioritizing it, other things are more serious to me or
5 important to me, or I'm going to take two months to get to it.
6 It's literally been I've been in trial almost all day long
7 every day since you were here. But trust me, I'm about as
8 upset as upset can be about what I heard on June 8th, and I'm
9 going to get to that ruling, and I know what I'm going to do.
10 And, well, like I said, it's just a matter of figuring out
11 dollars and whom, okay? There's going to be contempt. I just
12 haven't put it on paper because I've been in court all day and
13 I haven't come up with a dollar figure. Okay?

14 So I hope -- I don't know if that matters very much, but
15 it should.

16 All right. We stand adjourned.

17 (Proceedings concluded at 3:35 p.m.)

18 --oOo--

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

06/29/2021

24

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

EXHIBIT 42

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

	)	Case No. 19-34054-sgj-11
In Re:	)	Chapter 11
)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	March 1, 2022
	)	1:30 p.m. Docket
Reorganized Debtor.)	
	)	- REORGANIZED DEBTOR'S MOTION
	)	FOR ENTRY OF AN ORDER
	)	APPROVING SETTLEMENT WITH
	)	PATRICK DAUGHERTY [3088]
	)	- REORGANIZED DEBTOR'S MOTION
	)	FOR ENTRY OF AN ORDER
	)	FURTHER EXTENDING THE PERIOD
	)	WITHIN WHICH IT MAY REMOVE
	)	ACTIONS [3199]
)	
)	
ELLINGTON,	)	Adversary Proceeding 22-3003-sgj
)	
Plaintiff,)	
	)	STATUS CONFERENCE
v.	)	(NOTICE OF REMOVAL)
)	
DAUGHERTY,)	
)	
Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor: John A. Morris
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For Scott Ellington: Debra A. Dandeneau
Laura R. Zimmerman
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452 Fifth Avenue
New York, NY 10018
(212) 626-4875

1 THE COURT: Okay. And you know that I tend to
2 sometimes share my views just to see if it will spur a fit of
3 reasonableness or encourage people to settle or walk away.
4 I'm pretty exasperated with that attempt in this case. But
5 this litigation is -- I'm going to call it the stalking
6 lawsuit. Okay? Every time -- I don't know how much longer it
7 will be in my court, but as long as it's in my court I'm going
8 to call it what it is, a stalking lawsuit. It is one grown
9 man accusing another grown man of stalking. You know, it's
10 just embarrassing to me, and it should be embarrassing to
11 those involved.

12 Now, I have read the lawsuit and I have read that Mr.
13 Ellington accuses Mr. Daugherty of driving by his house,
14 driving by his father's house, driving by his sister's house,
15 driving by his office, 143 sightings, he's taking pictures.
16 And you know, if that's true, again, that's embarrassing. If
17 -- I don't even know what to say except this is embarrassing.
18 One grown man accusing another grown man of stalking. Okay?
19 A statute, by the way, that was designed to protect, you know,
20 ex-wives, girlfriends, battered women, from abusive men. You
21 know, gender doesn't matter, but wow. It's just -- I don't
22 know what to say except people should be embarrassed, and so
23 that's what I'm going to say.

24 I don't know if it's going to make a whit of difference in
25 anyone's litigation posture. But we'll come back on March

84

1 29th and we'll do what we need to do on the motions before the
2 Court.

3 (Proceedings concluded at 3:41 p.m.)

4 --oOo--

19 CERTIFICATE

20 I certify that the foregoing is a correct transcript from
21 the electronic sound recording of the proceedings in the
above-entitled matter.

22 **/s/ Kathy Rehling**

03/07/2022

23 _____
24 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date